A Comparative Perspective on Competition Law and Regulation of Premium Pay-TV in the UK and Australia

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DECLARATION

I hereby declare that this thesis is my own work and it has not been submitted for a degree at any other university.

Signed: …….

ABSTRACT

Digitalisation and convergence continue to transform the ways in which audio-visual content is supplied and consumed. This thesis examines the implications for the legacy regulatory frameworks of the analogue era. It explores the relationship between the prevailing approach to concurrent regulation under sector-specific legislation and general competition law, and the competitive conditions for the supply of premium pay-TV in the UK and Australia. Theories of harm for the assessment of market power relating to horizontal concentration of ownership, exclusive rights and refusal to supply, are also reviewed.

Whilst acknowledging an enduring role for sector-specific regulation, the thesis advocates an increasing residual role for the enforcement of general competition law. This is supported by the reinforcing effects of digitalisation and convergence upon the network industry aspect of pay-TV and the multi-sided platform characteristics of pay-TV providers. The thesis identifies the need for greater emphasis on the dynamic aspect of competition in the premium pay-TV context. This calls for a broader conceptualisation of competition which critically reflects the growth of online streaming, the global phenomenon around premium drama and the rise of multi-media firms in a global communications sector.

These findings are significant and timely because failure to employ a sufficiently broad concept of effective competition may perversely deter competitive conduct and unduly impede the investment incentives that are critical to premium pay-TV. It may also produce outcomes that are ostensibly inconsistent with the normative basis for sector-specific regulation. The thesis suggests reform at the interface between sector-specific legislation and general competition law, and refinement of the principles of competition law in their application to premium pay-TV. In doing so, it proposes a model of regulation which aims to more effectively balance the shared interest of viewers, as consumers and citizens, in the future development of pay-TV and the wider communications sector.

CHAPTER 1

INTRODUCTION TO THE THESIS

1.1 Thesis Aim and Objectives

This thesis examines the legal frameworks for regulating the supply of premium content, which is typically defined as live sporting events and first-run Hollywood movies,[1] on pay-TV in the United Kingdom ("UK") and Australia. It critically evaluates how effectively concurrent regulation under sector-specific legislation and general competition law addresses the structural tendency towards the concentration of market power in the television broadcasting of premium content and the migration of premium content to pay-TV.[2] The aim of the thesis is to evaluate the relative effectiveness of the frameworks in the UK (including at the European Union ("EU") level, where relevant) and Australia, in balancing public interest considerations and the maximisation of consumer welfare in the supply of premium pay-TV.[3] For this purpose, the focus is on the strong dynamic aspect of competition in the supply of premium pay-TV content and services in a converged digital environment.

The initial research objective is to identify how the specific economic characteristics of premium pay-TV (particularly pay-TV as a network industry and pay-TV providers as multi-sided platforms) confer a key role for premium

[1] 'Premium Pay TV Movies: Market Investigation Reference to the Competition Commission' (Office for Communications, 2010) 1-2 (UK) <https://www.ofcom.org.uk/__data/assets/pdf_file/0017/72008/pay-tv-movies-decision.pdf> accessed 13 August 2017. 'Report to Senator Alston, Minister for Communications, Information Technology and the Arts, on Emerging Market Structures in the Communications Sector' (Australian Competition and Consumer Commission, June 2003) 5 (AU) <https://www.accc.gov.au/system/files/Emerging%20market%20structures%20in%20the%20communications%20sector.pdf> accessed 13 August 2017.

[2] The term "television" is used in this thesis to refer to the process of broadcasting audio-visual content, as opposed to any specific mode of transmission or distribution platform (unless stated otherwise).

[3] Reasoning behind the adoption of the consumer welfare standard is contained in Section 1.3.1 below.

content in the development of pay-TV. Having regard to such characteristics, the thesis assesses the impact of digitalisation and technological convergence on the supply of premium pay-TV (especially new entry by telecommunications service providers and online streaming services), and hence the meaning of effective competition in the premium pay-TV context. This highlights the importance of broadening the definition of premium content to include original, typically scripted, cinematic-quality drama ("premium drama"). It then analyses the implications for the respective roles of sector-specific regulation and general competition law in the UK and Australia.

The thesis identifies that, whilst there remains a case for concurrent regulation under sector-specific legislation and general competition law, there is a decreasing role for sector-specific regulation in the digital era. It argues, by default, an increasing residual role for the enforcement of general competition law. In the light of this, the thesis reviews the theories of harm for assessing market power relating to horizontal concentration of ownership, exclusive licensing and refusal to supply under UK/EU and Australian competition law. It focuses on the impact of the changing broadcasting environment upon the ability and incentive of traditional pay-TV (i.e. cable and satellite) providers to exploit market power in the wholesale acquisition and supply of premium content, in order to anti-competitively foreclose downstream competition in the retail supply of premium content to viewers. To the extent that there remains such ability and incentive, the thesis suggests refinement of the standard principles of competition law, with the aim of more effectively protecting/promoting the investment incentives of traditional pay-TV providers and their competitors.

1.2 Context of the Research

Pay-TV has historically been dominated by a small number of traditional pay-TV providers due to the specific economics of pay-TV in the analogue era. However, technological developments and structural changes in the pay-TV industry are altering the competitive landscape. Digitalisation and the convergence of communications services facilitate new entry by established telecommunications service providers and online streaming services. Such new entry calls into question the extent to which the established principles of regulation remain appropriate. The network industry aspect of pay-TV and the multi-sided platform nature of pay-TV providers may produce market outcomes that are typically indicative of market failure.[4] However, having regard to such characteristics and the role of premium content in relation to the development of pay-TV, such outcomes can be interpreted as definitive of effective competition in the premium pay-TV context. Exploring the relationship between the changing nature of pay-TV and such characteristics, and the consequent impact on the competitive dynamic for the supply of premium pay-TV, represents the foundational basis of this thesis.

1.2.1 Changing nature of pay-TV in the digital age of convergence

Pay-TV refers to the transmission of television services via encrypted signals, which viewers can access upon payment, using the necessary decoding equipment. This has traditionally involved subscribers paying a monthly subscription fee to access the one-way, one-to-many delivery of cable or satellite services to a television set, and using a set-top box ("STB") to decode the encrypted signals. It is the subscription requirement that fundamentally distinguishes pay-TV from free-to-air ("FTA") television.[5] FTA television is transmitted via unencrypted signals that can be received by anyone with an

[4] Market failure refers to "the failure of a more or less idealized system of price-market institutions to sustain 'desirable' activities or to estop 'undesirable' activities." Francis M Bator, 'The Anatomy of Market Failure' (1958) 72(3) *Quarterly Journal of Economics* 351.

[5] In this thesis, "FTA" television refers generally to public service broadcasting and commercial terrestrial television (unless stated otherwise).

antenna, at no additional direct cost to the viewer. This is subject to the nuisance cost that advertising on commercial FTA television can impose on viewers (as discussed in the following chapter).

Premised on the ability of television to achieve various socio-cultural and political objectives on account of its pervasiveness,[6] FTA television (and more specifically public service broadcasting ("PSB")) aims to satisfy the public interest in television. This may take the form of seeking to "improve" audiences and, more broadly, society by ensuring the supply of programmes that are considered to be publicly desirable but likely to be under-supplied in a free market.[7] An underlying assumption is that the state, acting through the government/legislator, is best placed to define the public interest and to fulfil the programming needs of viewers in the name of the public interest. The ability of PSB and FTA television more generally to fulfil this role, and the legitimacy of governments/legislators in determining what programmes should be made available based on perceived notions as to what viewers "need", is inherently contentious.[8]

It is particularly contentious where PSB is funded directly by viewers through a licence fee (as in the UK),[9] and in relation to televised sport because of the high prices which the live television rights to major sporting events typically

[6] See generally, Michael Morgan, James Shanahan and Nancy Signorielli, *Living with Television Now: Advances in Cultivation Theory & Research* (Peter Lang 2012); John Tulloch, *Watching Television Audiences: Cultural Theories and Methods* (Bloomsbury Academic 2000); John Storey, *Cultural Consumption and Everyday Life* (Bloomsbury Academic 1999) 114.

[7] David Sawers, 'The Future of Public Service Broadcasting' in Michael E Beesley, Dan Goyder, Malcolm J Matson, David Sawers, William B Shew and Irwin M Stelzer, *Markets and the Media: Competition, Regulation and the Interests of Consumers* (Institute of Economic Affairs 1996) 83-84.

[8] See, for instance, Robert G Picard and Paolo Siciliani, 'Is there Still a Place for Public Service Television? Effects of the Changing Economics of Broadcasting' (Symposium organised by the Reuters Institute for the Study of Journalism, University of Oxford, September 2013) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Is%20There%20Still%20a%20Place%20for%20Public%20Service%20Television_0.pdf> accessed 11 July 2016.

[9] The licence fee in the UK is £147 and is payable by all households that watch live television (subject to limited exemptions). As of 1 September 2016, this also applies to downloading or watching BBC programmes on-demand, including catch-up television on BBC iPlayer, on any device. Communications Act 2003, pt 4; Communications (Television Licensing) Regulations 2004.

command.[10] By contrast, pay-TV primarily aims to entertain and to fulfil the interests of niche audiences through special-interest channels. This is based on what viewers "want", as demonstrated by their willingness to pay.

1.2.1.1 Internet television and the growth of online streaming

Digitalisation and the convergence of communications services facilitate the emergence of other pay-TV distribution platforms and services, which are based on a number of different revenue models. This includes the supply of video-on-demand ("VOD") services on "over-the-top" ("OTT") television, which may enable new entrants to bypass the networks of traditional pay-TV providers. For the purpose of this thesis, OTT television broadly encompasses the supply of three types of VOD services: (i) subscription-based VOD ("SVOD") services (such as California-based Netflix and Hulu); (ii) transactional VOD ("TVOD") services, which allow users to pay for individual programmes (such as Amazon Prime Instant Video and iTunes); and (iii) ad-supported VOD services, of which there may be "free" and/or "paid" versions (as with the Hulu-Plus monthly subscription and partially ad-supported services).[11] OTT services may be transmitted via the unmanaged public Internet or via private, managed networks (Internet Protocol television ("IPTV")). Independent OTT service providers include the likes of Netflix, Amazon Prime, Apple TV, iTunes and Google Play Movies (hereafter referred to generally as SVOD platforms).

1.2.1.2 Viewing paradigm of "any time, anywhere, any device"

Television is now consumed within the paradigm of "any time, anywhere, any device". The availability of live streaming, near-VOD, time-shifting and catch-up services enables viewers to access most programmes "on the move" on a laptop, tablet, smartphone or smartwatch. This represents a notable shift in

[10] See, for instance, Harry A Solberg, 'Sports Broadcasting: Is it a Job for Public Service Broadcasters? A Welfare Economic Perspective' (2007) 20(4) *Journal of Media Economics* 289.

[11] This is a joint venture between Disney-ABC Television Group (The Walt Disney Company), Fox Broadcasting Company (Twenty-First Century Fox) and NBCUniversal Television Group.

how viewers can consume content, from one-to-many to one-to-one, and one-way (linear) to two-way (on-demand) television. The increasing opportunities to personalise television services (such as where viewers can select how programmes end through branch narratives),[12] and the greater choice that this theoretically affords viewers,[13] intensifies the debate on the relative extent to which (if any) the supply of television programmes should be regulated according to what viewers "want" or "need".[14] There is also the practical challenge of accurately determining what viewers "need" or "want".

1.2.1.3 Emergence of social media as a broadcasting platform

Related to the growth of the Internet is the emergence of social media as a broadcasting platform. Television broadcasts can increasingly be accessed via social media platforms like YouTube, Snapchat, Facebook, Instagram, Twitter and Vine. By facilitating the exchange of dialogue between viewers in real time, social media also offers the possibility of enhancing audience engagement and increasing ratings.[15] Often viewers use social media whilst watching live television, but social media may also increase consumption ratings via online streaming, VOD and digital video recorders ("DVRs").[16] As will be suggested, the opportunity that this offers to commercial broadcasters in terms of advertising revenue is also potentially significant from a multi-

[12] Press Association, 'Netflix launches "choose your own adventure" interactive TV shows' *The Telegraph* (21 June 2017) <http://www.telegraph.co.uk/technology/2017/06/21/netflix-launching-choose-adventure-interactive-tv-shows/> accessed 11 August 2017.

[13] "Choice" may be assessed by reference to the number of channels, the number of independent content providers or the content itself. The proliferation of channels in the digital era only theoretically increases the choice for viewers because an increase in the number of channels or quantity of available content does not guarantee greater diversity of content. It may, in fact, lead to the duplication of content. Ben Calvert, Neil Casey, Bernadette Casey, Liam French and Justin Lewis, *Television Studies: The Key Concepts* (Routledge 2007) 182.

[14] This is also subject to the idea that people may favour content that reinforces their own existing views. See, for example, Silvia Knobloch-Westerwick and Jingbo Meng, 'Looking the Other Way: Selective Exposure to Attitude-Consistent and Counterattitudinal Political Information' (2009) 36(3) *Communication Research* 426.

[15] See, Hallvard Moe, Thomas Poell and José van Dijck, 'Rearticulating Audience Engagement: Social Media and Television' (2016) 17(2) *Television & New Media* 99.

[16] 'First Impressions: When and Why Social Program Engagement Matters' (Nielsen, 23 November 2015) <http://www.nielsensocial.com/first-impressions-when-and-why-social-program-engagement-matters/> accessed 17 June 2016.

sided market perspective. It will also be seen in Chapter 7 how the growth of social media platforms is relevant to the shift in the competitive access problem away from Conditional Access System ("CAS") technology such as STBs, towards Applications Programming Interfaces ("APIs") (i.e. the software supporting social media platforms) and the broadcast rights to premium content.

1.2.1.4 Meaning of pay-TV in the digital era

Such developments in the supply and consumption of pay-TV raise the question as to what constitutes "pay-TV" in the digital era. This inherently requires consideration of the relationship between traditional pay-TV and SVOD, and the extent to which the two may be regarded as substitutable. However, it is overly simplistic to perceive the competitive landscape as a battle between traditional pay-TV providers on the one hand and SVOD platforms (and possibly FTA broadcasters) on the other, because the distinction between them is diminishing. This is influenced by the bundling of communications services. The ability to provide triple-play services (broadband Internet, television and fixed telephony) and quad-play services (broadband Internet, television, fixed telephony and mobile telephony) has seen the entry of traditional pay-TV providers into telecommunications and the entry of established telecommunications service providers into pay-TV. The distinction also becomes less clear as more collaborations arise between traditional pay-TV providers and SVOD platforms i.e. for the supply of OTT television services on traditional pay-TV networks.

OTT television typically complements rather than replaces traditional pay-TV.[17] This is due, at least in part, to the fact that the supply and consumption

[17] 'Linear vs non-linear viewing: A qualitative investigation exploring viewers' behaviour and attitudes towards using different TV platforms and services providers' (Kantar Media, commissioned by Ofcom, May 2016) 55 (UK) <https://www.ofcom.org.uk/__data/assets/pdf_file/0029/68816/km_report.pdf> accessed 13 August 2017; 'TV today: free and paid, linear and on demand' (Roy Morgan press release,

of OTT television services often remains dependent on a subscription to a traditional pay-TV service. There is also a continued tendency for traditional pay-TV providers to secure a significant proportion of the broadcast rights to major sporting events.[18] An OTT television service is therefore unlikely to be regarded by viewers as a close substitute for a traditional pay-TV service for the consumption of such content. However, as suggested in Chapter 3 of the thesis, there are indications of change in this regard. The definition of pay-TV is important because it will have implications for how the relevant market is defined and the assessment of market power. For the purpose of this thesis, pay-TV is defined broadly at the beginning of Section 1.2.1, without reference to any particular distribution platform. The emphasis on technological neutrality is a theme which recurs throughout the thesis, with the focus being on the nature of the content supplied.

1.2.2 Re-definition of premium content in the digital era

Premium content is generally defined as premium sport and movie content.[19] Premium sport content refers to the live coverage of professional or elite sporting events. Football (sometimes known in Australia as soccer) of various codes attracts some of the largest audiences, so is especially appealing to broadcasters and advertisers. As will be seen, this is reflected in the escalating wholeprice price of the broadcast rights to leading football/soccer tournaments in the UK and Australia. In the UK, this includes the English Premier League ("Premier League") and the UEFA Champions League (organised by the Union of European Football Associations ("UEFA")). The "marquee" codes in Australia include the Australian Football League ("AFL"),

24 May 2016) (AU) <http://www.roymorgan.com/findings/6823-watching-television-by-free-to-air-broadcast-foxtel-or-on-demand-australia-april-2016-201605240526> accessed 14 July 2016.

[18] This is subject to the restrictions that are imposed by anti-siphoning regulation (as discussed in Chapter 6 of the thesis).

[19] Office for Communications (n 1) (UK); Australian Competition and Consumer Commission (n 1) 10 (AU).

the National Rugby League ("NRL") and Super Rugby.[20] Premium movies include first-run Hollywood blockbusters. For the purpose of this thesis, this includes movies licensed in the first subscription pay-TV window by the Major Hollywood Studios (Fox Filmed Entertainment, NBC Universal, Sony, Time Warner, The Walt Disney Company and Viacom (and their wholly-owned or controlled subsidiaries)).[21]

1.2.2.1 Boundary between premium sport content and sports news

In an era of content abundance, the question of what constitutes "premium content" is an interesting one. It is complicated by changes to the ways in which audio-visual content is supplied and consumed. With respect to developments in the coverage of major sporting events, for instance, the increasing supply and consumption of real-time or near-real-time coverage in highlight format on mobile devices, blurs the distinction between sports coverage and news.[22] The distinction is identified in the thesis as an area in which the changing broadcasting landscape calls for reconsideration of some of the assumptions on which the prevailing regulatory frameworks are based. It is significant because it will have implications for the extent to which sports rights may be perceived as being like ordinary market goods for regulatory purposes and, more specifically, the scope of sector-specific rules such as anti-siphoning and the right to short reporting. This will in turn have consequences for the structure of the market, and the ability of rights owners and broadcasters to monetise sports rights.

[20] Deborah Healey, 'Australia' in Ian Blackshaw, Steve Cornelius and Robert CR Siekmann, *TV Rights and Sport: Legal Aspects* (TMC Asser Press 2009) 215. Precisely what constitutes a "marquee" code or premium sport will vary to some extent between jurisdictions and possibly between states/nations within a single jurisdiction.

[21] This is based on the definition used by Ofcom in the UK. Office for Communications (n 1).

[22] It builds on the growing willingness of broadcasters in the 1990s to carry sports stories as mainstream news items and to apply increasing journalistic rigour to sports coverage. Raymond Boyle, *Sports Journalism: Context and Issues* (SAGE 2006) 72.

1.2.2.2 Basis on which content is defined as premium

Re-evaluation of the definition of premium content raises fundamental questions about what renders content "premium" and from whose perspective the premium nature of content is assessed i.e. viewers, broadcasters and/or advertisers. There is also the question of how the value that is attributed to premium content by such parties, whether collectively or individually, is measured and quantified. Whilst significant financial investment does not guarantee high quality content (however "high quality" may be determined), premium content is characteristically associated with substantial production values (including the cost of hosting major events in the sporting context). The value that is attributed to premium content may be deduced from the willingness of broadcasters to pay high prices for broadcast rights or high demand/consumption by viewers (with larger audiences, in turn, theoretically attracting greater advertising revenue). As will be discussed, however, the relationship between audience size and advertising revenue is not necessarily directly proportionate (with advertisers also being interested in the demographic of audiences and the attentiveness of viewers, for instance).[23]

The content which is valued most highly by viewers may be determined according to how much viewers demonstrate they are willing to pay to access it. However, willingness to pay does not necessarily equate with the ability to pay (and vice versa). Also, popularity is not always an accurate reflection of quality. These distinctions become of real significance only if the content in question is considered to be content that viewers "need" as opposed to "want" (which has already been identified as a contentious issue). The question as to whether quality even matters, if it is content that viewers want to consume, also only arises if premium content is distinguished from

[23] Bruce M Owen and Steven S Wildman, *Video Economics* (Harvard University Press 1992) 3.

ordinary market goods (i.e. goods which are subject only to market forces and general competition law enforcement).

As will be seen, certain sporting events are distinguished in this respect for regulatory purposes in both the UK and Australia. Sport is the genre of premium content that has attracted the most regulatory attention, due to the widely recognised socio-cultural functions of sport on FTA television (as discussed in the following chapter). Reference is made here to the combination of social and cultural functions of televised sport which have been the subject of much academic study and government policy.[24] It is well established that there are social and cultural interests in the television broadcasting of certain sporting events which the market alone would be unlikely to protect. Hence the introduction of regulation such as anti-siphoning rules.

By contrast, television drama has predominantly been regarded as being of entertainment value. There is increasing interest in the potential social and cultural value of drama.[25] The scope for considering this concept as a policy driver in relation to premium drama content could certainly form the basis of future research. Indeed, such research has arguably become more pertinent with the rise of premium drama as identified in this thesis. However, consistent with the focus elsewhere to date on the social and cultural functions of televised sport, discussion on the socio-cultural value of television for the purpose of the thesis focuses on premium sport content.

[24] For a review of such literature, see Tom Evens, Petros Iosifidis and Paul Smith, *The Political Economy of Television Sports Rights* (Palgrave Macmillan 2013) 52-67.

[25] Robin Nelson, *TV Drama in Transition* (Palgrave Macmillan 1997); John Caughie, *Television Drama: Realism, Modernism, and British Culture* (Oxford University Press 2000); Tony Bennett, 'Distinction on the Box: Cultural Capital and the Social Space of Broadcasting' (2006) 15(2-3) *Cultural Trends* 193-212; Elke Weissmann, *Transnational Television Drama: Special Relations and Mutual Influence between the US and UK* (Springer 2012); 'Measuring the Cultural Value of Australia's Screen Sector' (A report presented to Screen Australia by Olsberg SPI, 11 November 2016).

At the same time, the thesis calls for greater consideration of premium drama going forward and, to this end, calls into question the basis on which content is defined as premium. With respect to the basis on which movies are defined as premium, the UK Office for Communications ("Ofcom") notes three characteristics of first-run Hollywood movies that make them particularly compelling to consumers. Such characteristics include: (i) high quality (as defined by box office success); (ii) first airing on television (with consumers typically valuing movies more highly the shorter the period of time between box office release and first airing on television); and (iii) availability via subscription (with subscription services considered to be in greater demand than pay-per-view or TVOD, due to the perceived convenience of not having to pay for movies on an individual basis).[26] Having regard to the changing broadcasting environment, this thesis challenges reliance on such factors as the basis for restricting the definition of premium content to premium movie (and sport) content. For instance, the bundling of pay-TV content and services with other communications services renders the willingness of viewers to pay, a less reliable factor in identifying premium content. At the same time, the above characteristics can equally be applied to premium drama.

1.2.2.3 Re-defining premium content to include original, high quality drama

Viewers are also increasingly enticed to subscribe for pay-TV services by the availability of exclusive, original drama.[27] This is driven by the growth of online streaming services with business models based on the exclusive supply of original drama series. Based on upward trends in advertising spend, subscriber spend, and the levels of investment and airtime that are devoted to premium drama, this thesis argues the case for redefining premium content to include premium drama. This is significant because, as with the definition of pay-TV, it will have a bearing on the definition of the relevant

[26] Ofcom (n 1) para 1.6.
[27] See, Robin Nelson, *State of Play: Contemporary High-End TV Drama* (Manchester University Press 2007).

market and assessment of market power. The ways in which adopting this broader definition of premium content may produce outcomes that more accurately reflect economic reality in the digital era are considered throughout the thesis.

1.3 Significance of Focusing on the Specific Economics of Premium Pay-TV

The significance of this thesis lies in its focus on the extent to which the changing broadcasting landscape is a product of the specific economic characteristics of the pay-TV industry and premium content. This is used to ascertain the appropriate regulatory response to the reinforced tendency towards the concentration of market power over the supply of premium pay-TV. The specific economic characteristics of premium pay-TV give rise to market conditions that neoclassical economic theory dictate as indicative of market failure. However, having regard to the impact of the characteristics of pay-TV as a network industry and pay-TV providers as multi-sided platforms on the changing broadcasting environment (and vice versa), the thesis demonstrates the extent to which the prevailing market conditions in the UK and Australia should be seen as a consequence of effective competition.

This is rooted in the understanding that competition within any given industry is determined not simply by the competitive forces posed by existing firms, but in the underlying economics of the industry in question.[28] This includes the relative bargaining power of suppliers and consumers, and the threat of new entry and substitute products.[29] The tendency elsewhere is to focus on the use of competition law as a means of assisting new entry, particularly by so-called "new media" operators (i.e. distributors of audio-visual content on platforms other than traditional broadcast television, cable or satellite

[28] Michael E Porter, 'How Competitive Forces Shape Strategy' (1979) 57(2) *Harvard Business Review* 137.
[29] ibid 141.

television).[30] Such an approach risks intervening in a market to change its very structure, which it is argued is beyond the legitimate remit of competition law and policy. This is especially worrisome in the case of emerging markets in innovation-driven industries like pay-TV, in which rational, profit-maximising firms are likely to be better placed than regulators to identify and discipline potentially anti-competitive conduct.

In this respect, the thesis plays "devil's advocate" by challenging the basis on which UK/EU and Australian competition law is used to regulate the exercise of market power by traditional pay-TV providers in the premium content context. In doing so, it proceeds on the basis that the prevalence of market power is largely a consequence of the specific economic characteristics of premium pay-TV and the commercial arrangements which are entered into by pay-TV providers in response to such characteristics. It will be argued that these characteristics are more pronounced in the digital era. Hence the thesis reinforces the importance of regulating market power over the supply of premium pay-TV in the light of this context-specific concept of effective competition.

1.3.1 Effective competition and the goals of competition law and policy

The concept of "effective competition" is fundamental to the main provisions of UK/EU and Australian competition law. According to the General Court (a constituent court of the Court of Justice of the European Union), the competition referred to in the prohibition on anti-competitive agreements in Article 101 of the Treaty on the Functioning of the European Union ("TFEU") is taken to mean effective competition.[31] For the purposes of the prohibition on the abuse of dominance in Article 102 of the TFEU, a dominant position is

[30] Damien Geradin, 'Access to Content by New Media Platforms: A Review of the Competition Law Problems' (2005) 30(1) *European Law Review* 68.

[31] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 [109]; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1 ("TFEU").

defined as the power to "prevent effective competition being maintained on the relevant market."[32] The substantive test under the EU Merger Regulation is whether a merger would "significantly impede effective competition".[33] Similarly, in Australia, as the Trade Practices Tribunal (now the Australian Competition Tribunal ("ACT")) noted in *QCMA*,[34] "[c]ompetition is a process rather than a situation. […] whether firms compete is very much a matter of the structure of the markets in which they operate."[35]

1.3.1.1 Role of consumer welfare in competition policy

Competition policy is not about the pursuit of competition for its own sake, but rather to realise the consumer benefits of competition.[36] In economic terms, there is a choice of welfare standards in competition law between the total welfare standard and the consumer welfare standard. As a measure of how well an industry performs, total welfare is defined as the sum of producer surplus and consumer surplus (or consumer welfare).[37] Whether the total welfare or consumer welfare standard applies is dependent upon the framing of the objectives of competition law and policy.[38] This broadly concerns the relative importance that is attached to economic and non-economic considerations.

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[32] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207; (1978) 1 CMLR 429 [65]; Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461 [38].

[33] Council Regulation No.139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, as amended by Commission Regulation No.1033/2008 [2008] OJ L279/3 and Commission Implementing Regulation No.1269/2013 [2013] OJ L336/1 ("EU Merger Regulation") art 2(3).

[34] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (1976) 8 ALR 481; (1976) ATPR 40-012 (*QCMA*).

[35] ibid [17,246].

[36] Prof Frederick C Hilmer, Mark Rayner and Geoffrey Taperell, 'National Competition Policy Review' (Australian Government Publishing Service, 25 August 1993) ("Hilmer Report") xvi <http://ncp.ncc.gov.au/docs/National Competition Policy Review report, The Hilmer Report, August 1993.pdf> accessed 16 August 2017.

[37] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 18-19.

[38] ibid.

For instance, at the EU level, there are the competing goals in the Treaty of Lisbon.[39] However, with growing recognition of the role for economic analysis as part of the modernisation of EU competition law, there has been increasing emphasis on the maximisation of consumer welfare (especially by the European Commission).[40] By contrast, preference for the total welfare standard in Australia has been influenced by a broad interpretation of "public benefit" in relation to authorisation applications and notifications.[41] More generally, however, when dealing with consumers who are individuals as opposed to companies, there is said to be a preference for adopting the consumer welfare standard.[42]

1.3.1.2 Relationship between the consumer interest and the citizen interest

Whilst the definition of the term "citizen" will depend on the context and may vary over time,[43] it can generally be used to refer to an individual's interests in relation to the state. This includes the role of the individual citizen in participating in civil society by engaging in a range of social, cultural and political activities.[44] In fulfilling this role, the citizen interest is about more

[39] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[40] 'Rules Applicable to Merger Control' (European Commission, 1 December 2014) para 61; Guidance on the Commission's enforcement priorities in applying Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings OJ C(2009)45/7, para 19.

[41] *Re Qantas Airways Limited* [2004] ACompT 9, 42-875; *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385, 391. Generally speaking, authorisation and notification provide statutory protection against legal action in respect of conduct that might otherwise breach Australian competition law, when the public benefit from the conduct outweighs any public detriment. See, 'Authorisations and Notifications: A Summary' (Australian Competition and Consumer Commission, January 2011) <https://www.accc.gov.au/system/files/Authorisations%20and%20notifications%20a%20summary.pdf> accessed 30 August 2017.

[42] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11(1) *Competition Law Review* 133, 141.

[43] See, Janet Newman and John Clarke, *Publics, Politics & Power: Remaking the Public in Public Services* (Sage Publications 2009).

[44] On the meaning of the citizen interest in the media sector, see ''Citizens' and the ACMA - Exploring the Concepts within Australian Media and Communications Regulation: Occasional Paper' (Australian Communications and Media Authority, June 2010); Sonia Livingstone, 'What is the Citizen's Interest in Communication Regulation? Ofcom's Agenda for 'Citizens, Communications and Convergence'' (Paper presented to the Media, Communication and Humanity Conference, London School of Economics, 21-23 September 2008)

than private interests.[45] In furthering the citizen interest, the focus is on what is good for society as a whole.

By contrast, the concept of "consumer" refers to the actions of an individual in relation to a market. This includes participation in the marketplace by purchasing or otherwise consuming goods and services.[46] The purchasing decisions of consumers may be influenced by a sense of public responsibility, with the social practice of the ethical consumer "voting with their dollar".[47] Generally speaking, however, the actions of individuals as consumers are said to be motivated by personal desire and self-interest. The consumer interest is commonly described in terms of lower prices, better quality and more innovative products.

The focus in promoting the consumer interest is on making markets work better for consumers (i.e. the purpose of competition law and policy). In doing this, the citizen interest may be protected because the state includes the marketplace.[48] To some extent, the market will deliver on the interest of citizens in being able to access the services, content and skills needed to participate in civil society.[49] At the same time, the state extends beyond the marketplace, so the interests of consumers may be at odds with the citizen interest. Hence regulatory intervention in the market other than under

<http://eprints.lse.ac.uk/21561/1/whatisthecitizeninterestin%28LSEROversion%29.pdf> accessed 27 March 2018.

[45] Georgina Born and Tony Prosser, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations' (2001) 64(5) *Modern Law Review* 657, 671.

[46] On the ideological tension between the conception of individuals as consumers and citizens in the media context, see Sonia Livingstone and Peter Lunt, *Media Regulation: Governance and the Interests of Citizens and Consumers* (2011 Sage Publications); Sonia Livingstone, Peter Lunt, Laura Miller, 'Citizens, Consumers and the Citizen-Consumer: Articulating the Citizen Interest in Media and Communications Regulation' (2007) 1(1) *Discourse & Communication* 63-89; Sonia Livingstone, Peter Lunt and Laura Miller, 'Citizens and Consumers: Discursive Debates During and After the Communications Act 2003' (2007) 29(4) *Media, Culture & Society* 613-638.

[47] Josée Johnston, 'The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market' (2008) 37(3) *Theory and Society* 229-270.

[48] 'Citizens, Communications and Convergence: Discussion Paper' (Ofcom, 11 July 2008) para 2.20.

[49] ibid para 2.27.

general competition law, based on the understanding that there are certain outcomes required by society which would not be delivered by the market alone. This is known as the broader public interest.[50]

1.3.1.3 Focus in adopting the consumer welfare standard

The thesis adopts the consumer welfare standard for the purpose of evaluating the prevailing regulatory and competitive landscapes. The consumer welfare standard relates to citizen interests to the extent that promoting the consumer interest may also serve the citizen interest. Beyond this, there is sector-specific regulation aimed at protecting the broader public interest. The thesis considers the balancing of the consumer interest and the citizen interest by exploring regulatory issues at the intersection between general competition law and sector-specific legislation.

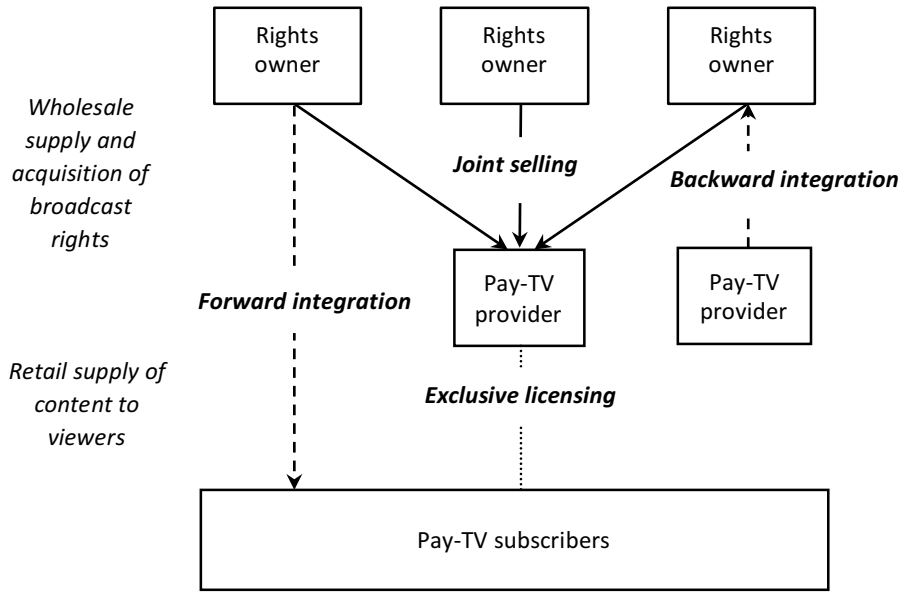
In adopting the consumer welfare standard, the focus should be on "the outcomes for consumers that competition in a particular market delivers – not the particular form that the competition process takes."[51] Such outcomes can be more difficult to determine in some industries than others, particularly where there is a rapid rate of technological development. The importance that the thesis places on adopting a context-specific concept of effective competition is significant because it aims to minimise the enforcement errors in using inappropriate theories of harm that may render the prevailing regulatory frameworks ineffective and potentially counterproductive. More broadly, it reinforces the importance of avoiding an overly-interventionist approach in regulating commercial arrangements that are ultimately entered

[50] ibid para 2.28; Shalini Venturelli, *Liberalising the European Media: Politics, Regulation, and the Public Sphere* (Clarendon Press 1998) 72; Lesley Hitchens, 'Citizen versus Consumer in the Digital World' in Andrew Kenyon, *TV Futures: Digital Television Policy in Australia* (Melbourne University Press 2007) 9.
[51] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010) 20-21.

into by rational profit-maximising firms,[52] in naturally oligopolistic, vertically-related markets.

1.3.2 Network industry aspect of pay-TV

As a network industry, pay-TV is typically comprised of a series of oligopolistic, vertically-related markets. High sunk costs and the presence of network effects (reinforced by the multi-sided nature of pay-TV providers) mean that there is a tendency towards high market concentration in the supply of premium pay-TV. The vertical structure of markets in the premium pay-TV context is underpinned by the main types of commercial arrangements which rights owners and traditional pay-TV providers enter into in an attempt to internalise such costs. This includes consolidation by merger and vertical integration, exclusive licensing and joint selling. The cumulative effect of these arrangements is to increase the level of concentration in the ownership of the rights to broadcast premium content and/or control over the means of supplying premium content to viewers.



[52] See generally, Thomas Hoehn, Carmen Matutes, Paul Seabright and Stefan Szymanski, 'The Americanization of European Football' (1999) 14(28) *Economic Policy* 203.

To maximise the return on the significant investment that is typically involved in the production of premium content, the rights to broadcast premium content are often granted on an exclusive basis for a defined period of time. Rights owners may integrate forwards into the retail supply of premium content to viewers. Pay-TV providers may integrate backwards into the production of premium content, to internalise some of the transaction costs otherwise involved in distributing or acquiring the rights to broadcast premium content. Exclusivity can also form part of joint selling arrangements by the clubs in a league, which further intensifies the level of concentration in the wholesale supply and acquisition of sports rights.

Together with multi-media and conglomerate concentrations in the pay-TV industry, such commercial arrangements reinforce the tendency for the rights to broadcast premium content to be concentrated amongst a relatively small number of pay-TV providers. Such pay-TV providers can enjoy significant economies of scale in the retail distribution of premium content as a consequence of the positive externalities attendant with having established a large subscriber base.[53] This is significant because, as will be seen in Chapters 5 to 7, mergers and horizontal/vertical integration are becoming more prevalent as firms seek to capitalise on the opportunities presented by technological convergence. It is subject to the possible displacement effects of the dynamic aspect of competition and the multi-sided nature of pay-TV providers. However, as identified in Chapter 8, relatively little is currently known about the precise market impact of such effects.

1.3.3 Multi-sided platform characteristics of pay-TV providers

Pay-TV providers act as multi-sided platforms by operating as intermediaries between content producers/rights owners (where content is not produced in-house), advertisers (where funded, at least in part, by advertising revenue)

[53] Select Committee on Communications, *The Ownership of the News* (HL 2007-08, 122-II) 243.

and subscribers. The concept of multi-sided platforms is an application of two-sided market theory.[54] Two-sided markets are said to arise:

> where the participants on each side care directly about the number of participants on the other (so there are bilateral network externalities). The two sides are intermediated by a platform, or platforms, which typically compete for business from both sides […] so the platform problem involves appropriate pricing for both sides of the market.[55]

By supplying viewers with access to content, content producers/rights owners with access to viewers and advertisers with exposure to potential customers, pay-TV providers compete for business on at least two different but inextricably linked sides.[56] Network externalities exist between the different sides which influence the pricing and other strategic decisions of pay-TV providers. It is therefore necessary to take each side into consideration when assessing the competitive effects of such decisions. In assessing the competitive effects of the exercise of market power by multi-sided platforms, the standard conceptual framework remains fundamentally appropriate. However, in applying the principles which underpin the framework, the need for multi-sided platforms to "get all sides on board" should be taken into account.

[54] Since the focus of the thesis is on the multi-sided nature of pay-TV providers, as opposed to the pay-TV industry more broadly, it uses the expression "multi-sided platform" (instead of two-sided or multi-sided market), in common with Evans and Schmalensee. David S Evans and Richard L Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press 2016).

[55] Simon P Anderson and Stephen Coate, 'Market Provision of Broadcasting: A Welfare Analysis' (2005) 72(4) *The Review of Economic Studies* 947, 950.

[56] See, Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) *Journal of the European Economic Association* 990; David S Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20(2) *Yale Journal on Regulation* 325; David S Evans and Richard Schmalensee, 'The Industrial Organization of Markets with Two-Sided Platforms' (2007) 3(1) *Competition Policy Insights* 151.

The importance of taking into consideration the specific economic characteristics of multi-sided platforms was recently affirmed by the ECJ, in its application of Article 101 of the TFEU to card payment systems in the *Cartes Bancaires* and *MasterCard* cases.[57] The interactions between the various sides of a multi-sided platform do not in themselves raise competition issues. As the European Commission noted in relation to the recent *Facebook/WhatsApp* merger, "[t]he existence of network effects as such does not a priori indicate a competition problem in the market affected by a merger."[58] There needs to be a case-by-case analysis of network effects.[59] Proceeding on this basis, the thesis builds on these rulings and the two-sided market theory literature,[60] by assessing the multi-sided nature of pay-TV providers in the premium content context. In doing so, it seeks to provide a perspective on how to incorporate multi-sided considerations into competition law analysis in this context.

1.4 Timeliness of the Thesis

The significance of the focus of this thesis on the specific economic characteristics of the market is reinforced by its timeliness. It is timely from a technological perspective in view of the rapid growth of the Internet as a broadcasting platform and the rise of online streaming. Linked to this is the increasing notoriety of premium drama within the business models of online streaming services and, in response, traditional pay-TV providers. It is also timely due to ongoing investigations into the supply of premium content on

[57] Case C‑67/13 P *Groupement des Cartes Bancaires (CB) v European Commission* [2014] 5 CMLR 22; Case C-382/12 P *MasterCard Inc and Others v European Commission* [2014] 5 CMLR 23. These cases are referred to further in Chapter 6 of the thesis.
[58] *Facebook/WhatsApp* (Case No COMP/M.7217) OJ C(2014)7239 [130]. This merger is considered in Chapter 5 of the thesis.
[59] ibid [135].
[60] Bernard Caillaud and Bruno Jullien, 'Competing Cybermediaries' (2001) 45(4-6) *European Economic Review* 797; Bernard Caillaud and Bruno Jullien, 'Chicken & Egg: Competition Among Intermediation Service Providers' (2003) 34(2) *RAND Journal of Economics* 309; Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: An Overview' (2006) 37 *Rand Journal of Economics* 645; Mark Armstrong, 'Competition in Two-Sided Markets' (2006) 37 *The Rand Journal of Economics* 668.

pay-TV in the UK and at the EU level, and the proposed reform of competition law and media ownership rules in Australia (as discussed below). The comparative analysis of the prevailing competitive conditions in the UK and Australia is therefore potentially invaluable for informing the debates in both countries on the appropriate approach to media market regulation in the digital era.

1.4.1 Growth of online streaming and the rise of premium drama

Major technological developments relevant to this thesis include the growth of the Internet as a broadcasting platform (which is made possible by the roll-out of increasingly fast broadband), the rise of online streaming and the mobile app revolution. As will be seen from the discussion in Chapter 3 on the competitive landscapes in the UK and Australia, the entry of established telecommunications service providers and online streaming services are transforming the ways in which premium content is supplied and consumed. The bundling of communications services and content is increasingly common, as is "multi-homing" by viewers and advertisers, where more than one service/platform is used to consume content or place advertisements. At the same time, some key distinctions between traditional pay-TV and other pay-TV services remain. Most notable is the fact that online streaming services have not yet entered the market for live sports broadcasting (though they may do at some point in the future). With the ongoing trend of traditional pay-TV providers and new entrants investing more in original drama, this is a critical time to assess the impact of these developments on the competitive landscapes in the UK and Australia.

The commissioning of premium drama for pay-TV is not new.[61] However, it is on the rise with the launch of an increasing number of dedicated premium

[61] For example, HBO's *The Sopranos* aired from 1999 to 2007 and remained its most watched drama series until it was overtaken by *Game of Thrones* in 2014. Daisy Wyatt, 'Game of Thrones beats Sopranos to become HBO's most-watched show' *The Independent* (6 June 2014)

drama channels, increasing advertising spend on slots in premium dramas,[62] and rising viewership figures and subscriber spend on premium drama. Premium drama also represents an area of potential growth for the Major Hollywood Studios, at a time when the economics of the cinema industry become relatively less attractive.[63] These trends may be partly explained by the growth in online streaming services whose business models are based on attracting subscribers with the on-demand availability of exclusive, original drama (often for unlimited viewing on a number of devices for a fixed fee). The most prolific in this respect, to date, is arguably Netflix. Since releasing its first original show *Lilyhammer* in February 2012, Netflix has reported more than a tenfold increase in the net worth of its content library.[64] It is said to have some 104million subscribers worldwide and creating new content is claimed to be critical to its success.[65]

1.4.1.1 Global phenomenon around premium drama

Despite being typically original and exclusive in nature, scarcity is less of an issue with premium drama than live sporting events or Hollywood blockbusters (as will be seen in the following chapter). Competing in the supply of premium drama is therefore generally more accessible to new entrants. This is especially the case for SVOD platforms which, as will be seen, typically have lower price points than traditional pay-TV providers. The impact of this is evident from the discussion in the following chapter on the level of

<http://www.independent.co.uk/arts-entertainment/tv/news/game-of-thrones-beats-the-sopranos-ratings-to-become-hbo-s-most-watched-show-9500777.html> accessed 13 August 2017.

[62] Brian Steinberg, 'TV Ad Prices: Football, *Empire*, *Walking Dead*, *Big Bang Theory* Top the List' *Variety* (29 September 2015) <http://variety.com/2015/tv/news/tv-advertising-prices-football-empire-walking-dead-big-bang-theory-1201603800/> accessed 13 August 2017.

[63] See, 'Split Screens: A tale of two Tinseltowns' *The Economist* (23 February 2013) <https://www.economist.com/news/business/21572218-tale-two-tinseltowns-split-screens> accessed 13 August 2017.

[64] The net value of Netflix's total content library reportedly increased from US$361,979 in 2010 to US$4,899,028 in 2014. Netflix Inc Annual Report for the period ending 31 December 2014, 15 <https://ir.netflix.com/secfiling.cfm?filingID=1065280-15-6&> accessed 13 August 2017.

[65] 'Netflix now has 104 million subscribers worldwide' *BBC News* (18 July 2017) <http://www.bbc.co.uk/news/business-40638924> accessed 13 August 2017.

new entry by SVOD platforms in the UK and Australia. Online distribution means that SVOD platforms can also more easily develop international operations and scale niche productions so that they are still profitable. The growing global market for premium drama is therefore significant as regards the possibilities for pay-TV providers (and broadcasters more generally) to monetise their content. This supports the argument made in this thesis that the exercise of market power in premium pay-TV must be assessed in the light of the opportunities and challenges presented by the international television drama market.

1.4.1.2 Media globalisation and the issue of localness of content

Concomitant with the growth of the global communications sector is the issue of the protection and promotion of the production of local content. As viewers increasingly consume audio-visual content from around the World, the question arises of the extent to which the protection/promotion of local content remains a regulatory concern. It is suggested here that media globalisation may, in fact, increase the perceived importance of localness of content, as individuals seek to reconcile their local interests with their responsibilities as global citizens. The question is then how local content should be regulated i.e. through sector-specific media ownership rules or by other policy means (such as the public service mandates of public service broadcasters and/or local content conditions in broadcasters' licences).

Integral to ascertaining the most effective approach towards the regulation of local content is the issue of how "local content" is defined. The definition of local content may vary between countries and between the different regions of individual countries (i.e. the devolved nations of the UK, and the federal states and territories of Australia). This is significant because how local content is defined will, for instance, have implications for the scope of media ownership rules, and consequently the structure of the market and residual

role for general competition law enforcement. It may also influence how broadcasters seek to differentiate their services in an increasingly crowded market. It will be suggested that the importance of local content is reinforced in the digital era by the fact that some broadcasters will seek to make their propositions even more local, in an attempt to further differentiate their services in the global marketplace.

1.4.2 Investigations into sport and movies on pay-TV in the UK and EU

In contrast to the situation in relation to premium drama, in the context of premium sport (and, to a lesser extent, premium movies), the regulatory focus firmly remains on the control over supply by traditional pay-TV providers. In the UK, this includes Ofcom's investigation in 2014 into the joint selling arrangements of the Football Association Premier League Limited ("FAPL") for the live UK television rights to Premier League matches.[66] It questioned whether the object or effect of such arrangements was the restriction or distortion of competition in the UK and/or EU, in contravention of the prohibition of anti-competitive agreements in Chapter I of the Competition Act 1998 ("CA1998") and/or Article 101(1) of the TFEU (set out in Section 1.5.1.2(ii) below). The investigation was closed in August 2016.[67] However, as will be seen, the decision to close this investigation is not beyond criticism.

As regards the distribution of premium movie rights in the UK, the Competition Commission ("CC") (now the Competition and Markets Authority ("CMA")), carried out an investigation between 2010 and 2012,[68] and

[66] 'Competition Act investigation into the sale of live UK audio-visual media rights to Premier League matches' (Competition and Consumer Bulletin CW/01138/09/14).

[67] 'Ofcom closes investigation into Premier League football rights' (Ofcom media release, 8 August 2016) <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/premier-league-football-rights> accessed 13 August 2017.

[68] 'Movies on Pay TV Market Investigation: A Report on the Supply and Acquisition of Subscription Pay-TV Movie Rights and Services' (Competition Commission, 2 August 2012) <https://assets.publishing.service.gov.uk/media/5519492940f0b614040001ca/main_report.pdf> accessed 13 August 2017.

investigations at the EU level are ongoing. In January 2014, the European Commission launched an investigation into the distribution of movie rights in the UK by the Major Hollywood Studios to Sky.[69] A Statement of Objections from the European Commission asserts that contractual restrictions have been put in place to prevent Sky from allowing EU consumers located elsewhere to access satellite or online pay-TV services available in the UK and Ireland.[70] By granting absolute territorial exclusivity to Sky, such restrictions were considered to eliminate cross-border competition between pay-TV providers and to partition the Internal market contrary to Article 101(1) of the TFEU.[71] The European Commission has since accepted commitments from Paramount Pictures (a subsidiary of Viacom),[72] but investigations continue in respect of the other Major Hollywood Studios.

Sky is also under the regulatory spotlight in the UK in the light of the proposed acquisition by Twenty-First Century Fox of the 61 per cent shareholding in Sky that it does not already own.[73] The proposed acquisition raises fundamental questions about the tension that can arise between compliance with EU competition law and protecting the public interest in media ownership in the UK. As will be discussed further in Chapter 5, the European Commission has unconditionally approved the proposed acquisition on competition grounds.[74] However, in the UK, the transaction looks set to be referred to the

[69] 'Commission investigates restrictions affecting cross border provision of pay TV services' (European Commission press release, 13 January 2014) <http://europa.eu/rapid/press-release_IP-14-15_en.htm> accessed 13 August 2017.
[70] 'Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland' (European Commission press release, 23 July 2015) <http://europa.eu/rapid/press-release_IP-15-5432_en.htm> accessed 13 August 2017.
[71] ibid.
[72] 'Commission accepts commitments by Paramount on cross-border pay-TV services' (European Commission press release, 26 July 2016) <http://europa.eu/rapid/press-release_IP-16-2645_en.htm> accessed 13 August 2017.
[73] David Bond, Matthew Garrahan and Arash Massoudi, '21st Century Fox makes £11.7bn formal bid for Sky' *Financial Times* (15 December 2016) <https://www.ft.com/content/1ca0eb1a-c2c4-11e6-9bca-2b93a6856354> accessed 13 August 2017.
[74] 'Commission clears 21st Century Fox's proposed acquisition of Sky under EU merger rules' (European Commission press release IP/17/902, 7 April 2017) <http://europa.eu/rapid/press-release_IP-17-902_en.htm> accessed 13 August 2017.

CMA for a Phase 2 investigation on the grounds of media plurality and genuine commitment to broadcasting standards.[75] There have been significant industry developments since the previously proposed acquisition of Sky by News Corporation in 2010 (which was abandoned in the summer of 2011 at the height of the phone hacking scandal surrounding the News of the World).[76] Despite such developments, the thesis argues the case for the referral and stresses the importance of ensuring that the proposed acquisition is assessed from a multi-media, multi-platform perspective.

1.4.3 Proposed reform of media ownership rules in Australia

Further to the final report in 2012 of the Convergence Review,[77] the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (previously the Media Reform Bill 2016) proposes the repeal of two key Australian media ownership rules (as discussed in detail Chapter 5 of the thesis). The Broadcasting Reform Bill reinforces the timeliness of this thesis because the proposed reform would pave the way for firms to enter into previously restricted transactions (including transactions of a cross-media nature, and consolidations between metropolitan and regional broadcasters). This would enhance the ability of Australian media firms to realise the economies of scale that are required to compete in an increasingly global communications industry.[78] The thesis welcomes the proposed repeal of the

[75] Letter from the Department for Culture, Media & Sport to Twenty-First Century Fox, Inc and Sky plc (29 June 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623306/DCMS_Letter_to_Sky_Fox_29_June_2017_Redacted.pdf> accessed 21 July 2017; 'Statement from the Culture Secretary on the proposed Sky plc / 21st Century Fox Inc. merger' <https://www.gov.uk/government/news/statement-from-the-culture-secretary-on-the-proposed-sky-plc-21st-century-fox-inc-merger> accessed 14 September 2017. Consideration of the proposed acquisition in this thesis focuses on the media plurality issue.

[76] James Robinson, 'News Corp pulls out of BSkyB bid' *The Guardian* (13 July 2011) <https://www.theguardian.com/media/2011/jul/13/news-corp-pulls-out-of-bskyb-bid> accessed 13 August 2017.

[77] 'Convergence Review: Final Report' (Department of Broadband, Communications and the Digital Economy, March 2012) <http://www.abc.net.au/mediawatch/transcripts/1339_convergence.pdf> accessed 13 August 2017.

[78] Explanatory Memorandum to the Broadcasting Legislation Amendment (Media Reform) Bill 2016, para 8.

rules. It suggests how enduring concerns about local content could be addressed through the introduction of a modified version of the media-specific public interest test that is found in the UK merger control rules in the Enterprise Act 2002 ("EA2002") (referred to in Section 1.5.1.2(i) below).

As regards the broader communications landscape, on 6 September 2016 Australia's competition regulator, the Australian Competition and Consumer Commission ("ACCC"), commenced a market study into the communications sector.[79] It released an Issues Paper outlining the areas that it proposes to explore as part of the study.[80] The growing availability of OTT television services over the Internet and increasing use of mobile devices to access the Internet are amongst key trends that the ACCC identifies as making the market study timely.[81] The final report for this study is expected to be released in November 2017.

1.4.4 Recent and proposed reform of Australian competition law

The thesis is also opportune from a competition law perspective in view of the recent Competition Policy Review ("Harper Review"),[82] which undertook a "root and branch" review of Australian competition law. The Harper Review was timely because the most recent major review of Australian competition law prior to this was undertaken by the National Competition Policy Review ("Hilmer Review") in 1992-1993.[83] Since the Hilmer Review preceded the launch of public Internet access in Australia in 1996, it did not anticipate the

[79] 'ACCC to undertake market study of the communications sector' (ACCC media release 144/16, 4 August 2016) <https://www.accc.gov.au/media-release/accc-to-undertake-market-study-of-the-communications-sector> accessed 13 August 2017.
[80] 'Competition in Evolving Communications Markets: Issues Paper' (ACCC, September 2016) <https://www.accc.gov.au/system/files/Comms%20Market%20Study%20-%20Issues%20Paper%20-%20September%202016.pdf> accessed 13 August 2017.
[81] ibid para 2.7.
[82] Former Prime Minister the Hon Tony Abbott MP and former Minister for Small Business the Hon Bruce Billson MP, 'Review of Competition Policy' (Treasury of the Federal Government of Australia media release, 4 December 2013) <http://bfb.ministers.treasury.gov.au/media-release/014-2013/> accessed 13 August 2017.
[83] Hilmer Report (n 36).

myriad of competition issues relating to digitalisation or convergence. By contrast, competition in the digital era was intended as a specific area of focus for the Harper Review, which published its final report in March 2015.[84]

A key recommendation of the Harper Review was the repeal of the prohibition on the misuse of market power in the now former Section 46 of the Competition and Consumer Act 2010 ("CCA") (formerly the Trade Practices Act 1974 ("TPA")).[85] In place of this, it recommended the introduction of a new Section 46 incorporating a "purpose and effects" test.[86] This proposal was not new.[87] The former Section 46 prohibited a corporation with a substantial degree of power in a market in Australia from taking advantage of such power in that or any other market for one or more of the proscribed purposes.[88] There has long been particular concern regarding the difficulties of satisfying the "taking advantage" and "proscribed purpose" requirements.[89] The Competition and Consumer Amendment (Misuse of Market Power) Act 2017, which received Royal Assent on 23 August 2017, duly amends the CCA. The new Section 46 is reproduced in Appendix 1 of the thesis. The likely implications of the new Section 46 for the role of Australian competition law in regulating access to premium content are considered in Chapter 7 of the thesis.

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[84] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, 'Competition Policy Review: Final Report' (Australian Government Commonwealth of Australia, March 2015) ("Harper Report") <http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf> accessed 13 August 2017.

[85] The CCA replaced the TPA as of 1 January 2011.

[86] Harper Report (n 84) 62.

[87] See, for instance, Senator the Hon Gareth Evans QC Attorney-General, Hon Barry Cohen MP Minister for Home Affairs and Environment, and Hon Ralph Willis MP Minister for Employment and Industrial Relations, 'The Trade Practices Act: Proposals for Change' (Canberra, February 1984) para 30.

[88] The proscribed purposes were: (a) eliminating or substantially damaging a competitor of the corporation or a body corporate related to the corporation in that or any other market; (b) preventing the entry of a person into that or any other market; and (c) deterring or preventing a person from engaging in competitive conduct in that or any other market. Competition and Consumer Act 2010, s 46.

[89] *Re Eastern Express Pty Limited v General Newspapers Pty Limited* [1991] FCA 321 [70].

There is also the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, which was introduced into the House of Representatives on 28 March 2017 (two days after it passed the Misuse of Market Power Bill). The Competition Policy Review Bill proposes (amongst other things) amendments to the national access regime in Part IIIA of the CCA (which is referred to in Section 1.5.1.2(iii) below). The proposed amendments are considered in Chapter 7 of the thesis. It will be suggested that such amendments support the general tenet of this thesis, namely that there is an increasing residual role for the enforcement of general competition law in regulating the supply of premium pay-TV in Australia.

Access to premium content and the specific economic characteristics of two-sided markets are also identified as key issues in the ACCC's draft Media Merger Guidelines.[90] The draft Guidelines were released for public consultation on 26 August 2016, in the light of the then proposed reforms under the Broadcasting Reform Bill. Consultation on the draft Guidelines closed on 14 October 2016. A review of the ACCC's Media Merger Guidelines is timely given that it has been more than a decade since the existing Guidelines were published in 2006.[91] However, as suggested in Chapter 5 of the thesis, the draft Guidelines still represent an opportunity for the ACCC to provide further clarification regarding the appropriate framework for assessing media mergers in the digital era.

1.5 Research Methodology

The thesis is a comparative study on the regulation of market power over the supply of premium pay-TV content and services in the UK and Australia. The broadcasting and regulatory landscapes in the UK and Australia bear many

[90] 'Draft Media Merger Guidelines' (ACCC, August 2016) <https://consultation.accc.gov.au/mergers-and-adjudication/draft-media-merger-guidelines/supporting_documents/Draft Media Mergers Guidelines.pdf> accessed 18 August 2017.

[91] 'Media Merger Guidelines' (ACCC, August 2006) <https://www.accc.gov.au/system/files/Media Mergers - 2011.pdf> accessed 18 August 2017.

similarities. Both have a mixed system of public and commercial television (with a strong PSB tradition), pay-TV industries historically dominated by a single pay-TV provider, and concurrent regulation of media markets under sector-specific legislation and general competition law. There are also some important differences, including the more comprehensive system of sector-specific regulation that prevails in Australia, where broadcast markets are smaller and more concentrated than in the UK. The approach to regulating the supply of premium content in the UK is influenced at the EU level by (amongst other things) the policy objective of promoting a single market for audio-visual media services, as implemented by the Audio Visual Media Services Directive ("AVMSD").[92] Whilst complicating the comparative aspect of the thesis, such differences equally serve to further it.

1.5.1 Comparative analysis of regulatory frameworks in the UK and Australia

The primary comparators for the purpose of this thesis are the UK and Australia. Discussion on the changing broadcasting environments and regulatory frameworks therefore focuses on these two jurisdictions. However, as a consequence of the UK's accession to the EU in 1973,[93] UK law must be assessed in the light of the direct effect and supremacy of EU law in EU Member States.[94] UK law must follow EU law. In the competition law context, this includes the system of parallel competence under which the courts and national competition authorities ("NCAs") of Member States must apply EU competition law when assessing impugned conduct which may affect trade between Member States.[95] NCAs must also act in "close cooperation" with the European Commission to ensure consistency in the

[92] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1 ("AVMSD").
[93] European Communities Act 1972.
[94] ibid s 2.
[95] Council Regulation No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union [2003] OJ L001/1, arts 3 and 11.

application of EU competition law across the EU.[96] Also, under Section 60 of the CA1998, UK courts must apply UK competition law consistently with EU competition law, and have regard to relevant decisions/statements of the European Commission.

1.5.1.1 Relevance of EU law and policy in the UK in the light of Brexit

On 23 June 2016, the UK Government held a referendum on whether the UK should leave or remain in the EU. By a slim majority, voters elected to leave the EU. The UK Government consequently voted to activate the UK's right to withdraw its membership of the EU.[97] On 29 March 2017, UK Prime Minister Theresa May notified the European Council of the UK's intention to leave the EU ("Brexit").[98] This triggered a 2-year period for negotiating the terms of the withdrawal, and future relations between the UK and the rest of the EU.[99] The precise impact of Brexit on the future influence of EU competition law and policy in the UK remains unclear. Possible implications of Brexit within the premium pay-TV context are considered in the thesis. However, for the duration of the negotiating period, UK law remains subject to EU law.[100] The thesis therefore proceeds on this basis and refers, where appropriate, to "UK/EU" competition law.

1.5.1.2 Legal frameworks that are the subject of the comparative analysis

The thesis normatively analyses the regulation of market power under the UK/EU and Australian legal frameworks governing: (i) horizontal concentration in the ownership of the rights to broadcast premium content

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[96] ibid preamble recital 15 and art 11(1).

[97] TFEU (n 31) art 50(1). The European Union (Notification of Withdrawal) Act 2017 received Royal Assent on 16 March 2017.

[98] Letter from UK Prime Minister Theresa May to European Council President Donald Tusk (29 March 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf> accessed 21 April 2017.

[99] The European Council may unanimously decide, in agreement with the UK, to extend this period. TFEU (n 31) arts 50(2) and 50(3).

[100] ibid art 50(3).

and the means of supplying such content to viewers; (ii) exclusive licensing of the rights to broadcast premium content; and (iii) unilateral refusal to supply the rights to broadcast premium content or allow access to the physical/technical means of supplying content to viewers:

(i) Horizontal concentration in the rights to broadcast premium content in the UK may be subject to review as a "relevant merger situation" under the EA2002,[101] where it results or may be expected to result in a substantial lessening of competition in the UK. Where there is a concentration with a Community dimension,[102] the EU Merger Regulation will apply.[103] Similarly, a merger that has the effect or likely effect of substantially lessening competition in a market for goods or services in Australia is prohibited (subject to the parties obtaining clearance or authorisation) under Section 50 of the CCA. In media merger cases in the UK, the Secretary of State for Business, Innovation and Skills may intervene on the public interest grounds of plurality and other considerations relating to the media.[104]

In both the UK and Australia, merger control rules operate alongside sector-specific rules on media ownership and control. Such rules are contained in the UK in the Broadcasting Act 1996 ("BA1996") (as amended by the

[101] In determining whether a "relevant merger situation" has or will be created, Sections 23-30 and 34 of the Enterprise Act 2002 apply.
[102] A concentration will have a "Community dimension" if the turnover thresholds in Articles 1(2) or 1(3) of the EU Merger Regulation are satisfied. EU Merger Regulation (n 33).
[103] The substantive test for the appraisal of concentrations with a Community dimension is whether the concentration would significantly impede effective competition in the Internal market or in a substantial part of the Internal market. ibid art 2(3).
[104] Enterprise Act 2002, s 42(1). The public interest considerations in broadcasting mergers are defined in Section 58(2C) of the Enterprise Act 2002, as amended by Section 375 of the Communications Act 2003.

Communications Act 2003 ("CA2003")),[105] and in Australia in the Broadcasting Services Act 1992 ("BSA").[106] The thesis identifies an increasing tendency for horizontal concentration of ownership in the digital era. The implications of this for the intersection between sector-specific media ownership regulation and the enforcement of merger control rules is explored in Chapter 5 of the thesis.

(ii) Exclusive rights arrangements in the UK may contravene the prohibition under Chapter I of the CA1998 on agreements that have as their object or effect the prevention, restriction or distortion of competition in the UK, and which may affect trade within the UK.[107] The Chapter I prohibition largely reflects the corresponding prohibition in Article 101(1) of the TFEU.[108] This prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition in the Internal market, and which may affect trade between Member States. Prohibition under Article 101(1) may be declared inapplicable pursuant to Article 101(3) where there are efficiency gains which contribute to improving the production or distribution of goods, or to promoting technical or economic progress. This is provided that a fair share of such gains are passed on to consumers, the restrictions on competition are indispensable for attaining such objectives and competition is not eliminated in respect of a substantial part of the goods in question.

[105] Communications Act 2003, sch 14.
[106] Broadcasting Services Act 1992, ss 53 and 54.
[107] Competition Act 1998, s 2(1).
[108] TFEU (n 31).

Contracts, arrangements or understandings that are likely to substantially lessen competition in a market in Australia are subject to prohibition under Section 45 of the CCA. There is also a specific provision on exclusive dealing in Australia in Section 47 of the CCA. This provides that corporations may engage in exclusive dealing conduct (except "third-line forcing" which is strictly prohibited),[109] provided that it does not substantially lessen competition in a market in Australia. The licensing of rights to various sporting events is subject to restrictions imposed under anti-siphoning regulation, which aims to prevent the migration of the coverage of listed events exclusively to pay-TV. This includes the Australian "anti-siphoning" rules in the BSA and the UK "listing" rules in the Broadcasting Act 1996.[110] The respective impact of these rules on the structure of the market and regulatory implications are considered in Chapter 6 of the thesis.

(iii) There is no general duty to deal under UK/EU or Australian competition law. However, in the UK, a refusal to supply may infringe the prohibition in Chapter II of the CA1998 on the abuse of a dominant position in a market which may affect trade in the UK.[111] Article 102 of the TFEU similarly prohibits the abuse of a dominant position within the Internal market in so far as it may affect trade between Member States. Under EU competition law, a "special responsibility" is

[109] "Third-line forcing" occurs where a supplier offers goods/services on the condition that the purchaser also buys goods/services from another specific supplier, or where a supplier refuses to supply because the purchaser will not buy from another specific supplier. Competition and Consumer Act 2010, ss 47(6) and 47(7). The prohibition of third-line forcing is subject to authorisation under Section 88(8), where it can be justified on public benefit grounds.

[110] Broadcasting Services Act 1992, s 115(1); Broadcasting Services (Events) Notice (No.1) 2010, sch (AU). Broadcasting Act 1996, pt IV; Code on Sports and Other Listed and Designated Events (Ofcom, 4 July 2014) (UK).

[111] Competition Act 1998, s 18(1).

imposed on an undertaking in a dominant position "not to allow its conduct to impair genuine undistorted competition on the [internal] market."[112] Dominant firms may claim an objective justification to legitimise conduct that is prima facie abusive, where the conduct pursues the legitimate end of making a profit through proportionate means.[113]

A refusal to supply in Australia will be unlawful if it involves the misuse of market power contrary to Section 46 of the CCA. The new Section 46 prohibits corporations with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that market (or in any other market in which the corporation or related corporation supplies, acquires or is likely to supply or acquire goods or services). The ability of rights owners and dominant pay-TV providers to refuse third parties access to premium content rights or communication infrastructure is also subject to sector-specific access regulation in both Australia and the UK. Such regulation is contained in the UK in the CA2003, and in Australia in Parts IIIA, XIB and XIC of the CCA. The respective roles for access regulation and general competition law on refusal to supply within the premium pay-TV context in the digital era are discussed in Chapter 7 of the thesis.

[112] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, 3511 [57].
[113] Opinion of A-G Kirschner in Case T-51/89 *Tetra Pak Rausing SA v Commission of the European Communities* [1990] ECR II 309 [67].

The thesis comparatively analyses the public enforcement of the above frameworks. It studies the interpretation and application of the statutory provisions, and associated decisions of the UK/EU and Australian courts and competition authorities. This includes the regulatory practice of the CMA (which replaced the CC and the Office of Fair Trading ("OFT") as the NCA for the UK as of 1 April 2014),[114] the European Commission and the ACCC. It also includes decisions of Ofcom which has concurrent powers with the CMA to enforce the Chapter I and II prohibitions (and Articles 101 and 102),[115] in relation to communications matters in the UK.[116] The regulatory practice of the Australian Communications and Media Authority ("ACMA"), which is responsible for the public enforcement of the media ownership and control provisions in the BSA, is also considered.

1.5.2 Rationale for the choice of comparators

The UK and Australia serve as useful comparators for the purposes of legal research due to similarities between their legal systems and political structures. As a consequence of English colonisation, Australian jurisprudence is derived from the traditions of English common law. Sharing a common law heritage, the UK and Australia bear a system of jurisprudence that is based on judicial precedent and practice. In addition to the reception of English law,[117] Australia inherited the Westminster system of parliamentary government. However, since legislative and judicial independence,[118] Australian jurisprudence has developed its own distinctive characteristics which reflect the country's specific socio-cultural, geographic, economic and political conditions. A key point of divergence is Australia's federal structure where powers are shared by national and state governments according to the

[114] Enterprise and Regulatory Reform Act 2013, pt 3.
[115] Communications Act 2003, s 371.
[116] Competition Act 1998 (Concurrency) Regulations 2004; Commission Notice on cooperation within the network of competition authorities [2004] OJ C101/43.
[117] Australian Courts Act 1828, s 24 (New South Wales, Queensland and Victoria); Acts Interpretation Act 1915, s 48 (South Australia); Interpretation Act 1918, s 43 (Western Australia).
[118] Australia Act 1986.

Australian constitution. This is in contrast to the transfer of powers in the UK to the devolved nations.[119] The regulatory implications of such characteristics are considered, where appropriate, throughout the thesis.

1.5.2.1 Similarities between broadcasting and regulatory regimes

In terms of similarities between broadcasting environments, the UK and Australia share a strong history of FTA television founded on the Reithian tradition to "inform, educate and entertain".[120] This indicates a common understanding that the function of traditional broadcast television extends beyond pure entertainment and not all television broadcasts are necessarily to be treated as being simply like any other tradable commodity. Both jurisdictions also adopt a mixed system of public and commercial television, and pay-TV providers founded by the Australian-born American media proprietor, Rupert Murdoch. This includes Sky UK Ltd ("Sky") (formerly British Sky Broadcasting ("BSkyB"), a wholly-owned subsidiary of pan-European satellite broadcaster, Sky plc) in the UK,[121] and Foxtel Management Pty Limited ("Foxtel") in Australia.

As already noted, the UK and Australia both operate systems of regulation based on a combination of general competition law and sector-specific legislation. As will be seen, sector-specific regulation in Australia is generally more comprehensive than in the UK. To some extent, this can be related back to Australia's smaller and more concentrated markets. However, the thesis does identify scope for deregulation in support of the central argument of the

[119] However, the subject matter of the Broadcasting Act 1990 and the Broadcasting Act 1996 are reserved to Westminster.
[120] John CW Reith, *Broadcast over Britain* (Hodder & Stoughton 1924) 34.
[121] Following BSkyB's acquisition of Sky Italia and a 90 per cent interest in Sky Deutschland in November 2014, its holding company, British Sky Broadcasting Group plc, changed its name to Sky plc. BSkyB also changed its name to Sky UK Limited, which trades as Sky. 'Sky creates Europe's leading entertainment company' (Sky news release, 13 November 2014) <http://www.iii.co.uk/research/LSE:BSY/news/item/1282195> accessed 4 August 2016.

thesis that there is an increasing residual role for the enforcement of general competition law.

1.5.2.2 Geographic and economic differences between the UK and Australia

There are important differences between the geographic landscapes and economic conditions in the UK and Australia which have ramifications for the respective broadcasting environments and regulatory frameworks.[122] Despite being the sixth largest country in the World by land mass,[123] Australia is a geographically-diverse, small market economy. It has a low population density, with the majority of inhabitants concentrated in and around the coastal cities of Sydney and Melbourne. Significant distances between the most densely populated East coast and the rest of Australia render universal service provision a particular priority. It simultaneously presents physical and technical challenges for the development of network infrastructure. This is important because small market economies typically have more concentrated markets with high barriers to entry.

In small market economies, the large size of the minimum efficient scale relative to demand tends to create high levels of market concentration.[124] This is especially likely in industries, such as traditional pay-TV, where significant economies of scale mean that only a few firms may be able to compete effectively.[125] As Gal notes, such economies generally cannot support the same level of competition as larger economies.[126] The thesis has regard, where appropriate, to such differences between the jurisdictions, which arguably enrich its comparative element. Since the thesis focuses on

[122] For key indicators for the UK and Australia, see Appendix 2 of the thesis.
[123] Australia is the sixth largest country after Russia, Canada, China, the US and Brazil. 'Australia's Size Compared' (Australian Government Geoscience Australia) <http://www.ga.gov.au/scientific-topics/national-location-information/dimensions/australias-size-compared> accessed 4 August 2016.
[124] Minimum efficient scale refers to the scale of operation at which the average unit cost of production is first minimised. Michal S Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003) 15, 18.
[125] ibid 20.
[126] ibid 4.

the specific economic characteristics of premium pay-TV, the broader economic climate in which the UK and Australian markets operate are inherently pertinent.

1.5.2.3 Different institutional arrangements for communications regulation

Fundamental questions regarding the regulation of television are the appropriate role for the state and on what grounds, if any, television broadcasts (and, more specifically, premium content) are distinguishable from ordinary market goods. This thesis identifies the potential regulatory implications of the increasing personalisation of television services, for example. However, it stops short of suggesting that all premium content should be treated like any other tradable commodity, by accepting that the normative basis for anti-siphoning regulation remains sound, for instance. The trend identified in this thesis of a reinforced tendency towards the concentration of market power in the supply of premium pay-TV raises complex socio-cultural, as well as economic, issues. Linked to this is the question of how the public enforcement responsibilities for regulating the effects of market concentration should be allocated.

A key difference between the UK and Australia in this regard is that the UK has separate regulators in the CMA and Ofcom, whilst Australia has a combined regulator in the ACCC. As will be discussed in Chapter 5, the amalgamation of competition law and regulatory responsibilities with the formation of the ACCC in 1995 followed recommendations of the Hilmer Review.[127] Industry-specific and economy-wide approaches each have their own strengths and weaknesses. The relative desirability of the two approaches is considered in connection with the proposals (also made in Chapter 5) for the creation of a separate regulator to administer a media-

[127] Hilmer Report (n 36).

specific public interest test in Australia. These proposals are especially timely given the recent review of ACMA by the Federal Government of Australia.[128]

1.5.2.4 Relevance of the US as a point of reference in the comparative analysis

Reference will also be made, where appropriate, to the legal and regulatory frameworks in the United States ("US"). US antitrust law offers a useful point of reference due to its longevity, with the passing of the Sherman Act in 1890 and the Clayton Act in 1914. Also, much premium movie and drama content is sourced from the US. The strength of the US audio-visual market is increasingly pertinent with the growth of the global communications sector. As will be demonstrated in Chapter 3, it is relevant in terms of the global scale of US-based media firms like Netflix and Amazon, and competition between such firms and UK/Australian rivals at the national and international level.

However, there are fundamental differences between the economic climates and broadcasting landscapes in the US on the one hand, and in the UK and Australia on the other. Firstly, there is the relative size of the markets, with the US market being significantly larger than the UK market (and especially the Australian market). As will be seen, this has potentially significant implications for the ability of rights owners and broadcasters to monetise their rights. Whilst broadcasting in the UK and Australia has been dominated by FTA television and the public service role of traditional broadcast television (as discussed in Chapter 3), broadcasting in the US is predominantly market-

[128] 'Review of the Australian Communications and Media Authority: Final Report' (Department of Communications and the Arts, October 2016) <https://www.communications.gov.au/documents/review-australian-communications-and-media-authority-final-report> accessed 10 August 2017.

driven. Amidst accounts of "cord-cutting",[129] it is reported that 83 per cent of US households still subscribe to some form of pay-TV service.[130]

Meanwhile, FTA television accounts for 37 per cent of viewership time in the US, compared to 77-95 per cent in the EU.[131] The relatively high popularity of FTA television in the UK and Australia may be partly explained by the absence of anti-siphoning regulation in the US.[132] However, the migration of content to pay-TV has not proven to be a significant issue in the US, which indicates that anti-siphoning regulation is not the only factor at play in the possible migration of premium content to pay-TV.[133] Such differences between the jurisdictions are considered throughout the thesis.

1.5.3 Purpose of the comparative analysis

The comparative analysis in this thesis seeks to identify and evaluate similarities and differences between the regulatory approaches in the UK and Australia as a means to an end, rather than an end in itself. It adopts an "applied" version of comparative law,[134] under which the evaluation is used

[129] "Cord-cutting" refers to pay-TV subscribers cancelling their pay-TV subscriptions. Scott Moritz and Gerry Smith, 'Pay-TV Losing 300,000 Users Is Good News Amid Cord-Cutting' *Bloomberg Business* (19 October 2015) <https://www.bloomberg.com/amp/news/articles/2015-10-19/pay-tv-losing-300-000-customers-is-good-news-in-cord-cutting-era> accessed 13 August 2017.

[130] '83% of U.S. households subscribe to a pay-TV service' (Leichtman Research Group Inc press release, 3 September 2015) <http://www.leichtmanresearch.com/press/090315release.html> accessed 11 February 2016. The relatively high cable viewer figures in the US must be seen within the context of the US "must-carry" rules in the Cable Television Consumer Protection and Competition Act of 1992 which, under certain circumstances, require cable systems to carry local broadcast television channels.

[131] Jason B Bazinet, Mark May, Catherine T O'Neill, Michael Rollins and Thomas A Singlehurst, 'The Curtain Falls: How Silicon Valley is Challenging Hollywood' (Citi Global Perspectives & Solutions, October 2015) 63 <https://ir.citi.com/vYIHfw6T8570v%2FHslp4ehC5Bh7rTeNIOB7Z%2FIIOpNygp8gdTXn%2BxhZDUi9bZS0kUDJie4hNVu7M%3D> accessed 13 August 2017.

[132] Anti-siphoning rules were adopted by the US Federal Communications Commission in 1970, but struck down in 1977 for infringing the First Amendment to the US Constitution. *Memorandum Opinion and Order* 23 FCC 2d 825 (1970), codified in 47 CFR §76.225 (1976); *Home Box Office v FCC* 567 F 2d 9 (1977).

[133] See, Stefan Szymanski, 'Why Have Premium Sports Rights Migrated to Pay-TV in Europe but not in the US' in Stefan Szymanski, *The Comparative Economics of Sport* (Palgrave Macmillan 2010).

[134] Reference is made here to the distinction between comparative law in its "theoretical-descriptive form" (where the principal aim is to say how and why certain legal systems are different or alike) and comparative law in its "applied version" (where the aim is to provide advice on legal policy). Hein Kötz

to contribute to the ongoing debates in both jurisdictions on media market regulation in the digital era. It is acknowledged that legal rules cannot be fully understood without considering the non-legal contexts in which they are formulated and applied in practice.[135] As noted above, pay-TV providers in the UK and Australia inherently face different competitive conditions. The limitations which such considerations impose on drawing conclusions from the findings of the comparison are discussed, where relevant, throughout the thesis.

It is also acknowledged that it is not possible to simply transplant legal rules from one jurisdiction into another without modification.[136] The thesis therefore adopts the "social science theory" use of comparative law,[137] to compare the laws of the relevant legal systems in their specific socio-cultural and historical contexts. By identifying what lessons the UK and Australia may learn from one another, the thesis proposes what Zweigert and Kötz describe as a "better solution"[138] approach. This may be modified, where necessary, to reflect the distinct socio-cultural, geographical and economic conditions in the respective jurisdictions. The importance of adopting such an approach is reinforced in the digital era by the rapid rate at which the nature of pay-TV is changing, and the relative extent to which such change is affecting established perceptions of the competitive dynamic for the supply of premium content in the UK and Australia.

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and Konrad Zweigert, *An Introduction to Comparative Law*, vol 1 (2nd edn, Oxford University Press 1987) 11-12.

[135] Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke, *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 167.

[136] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4(2) *Maastricht Journal of European and Comparative Law* 111. "A living body of law is not a collection of doctrines, rules, terms and phrases […] but a culture; and it has to be approached as such." Lawrence M Friedman, 'Some Thoughts on Comparative Legal Culture' in David S Clark and John H Merryman, *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker and Humblot 1990) 49-50.

[137] Reza Banakar, 'Review Essay: Power, Culture and Method in Comparative Law' (2009) 5(1) *International Journal of Law in Context* 69.

[138] Kötz and Zweigert (n 134) 15.

CHAPTER 2

ECONOMIC CHARACTERISTICS OF PREMIUM CONTENT AS A DRIVER OF PAY-TV

2.1 Introduction

Premium content is widely recognised as being a key driver in the development of pay-TV.[139] The ability to attract large audiences who are willing to pay renders premium content especially desirable to pay-TV providers with revenue models based on subscription fees and advertising revenue. However, premium content is scarce. To maximise the return on the substantial investment that is typically required to produce premium content, rights owners often grant broadcast rights on an exclusive basis for a defined period of time. The cumulative effect of such scarcity and exclusivity is an upward pressure on the wholesale cost to broadcasters of acquiring such rights. In the analogue era, access to premium content was consequently restricted to a small number of traditional pay-TV providers. Over time, this reinforced their ability to acquire further rights and entrenched their position in the downstream market for the supply of premium content to viewers.

Access to premium content consequently presents both opportunities and challenges for new entrants. The network externalities that exist between rights owners and viewers, and between viewers and advertisers, give rise to the so-called "chicken and egg" problem for new entrants in accessing the rights to broadcast premium content. The socio-cultural functions of televised sport and the ability of the live coverage of major sporting events to command the largest captive audiences reinforce the effects of this within the premium

[139] 'Pay TV Statement' (Ofcom, 31 March 2010) 44 (UK) <https://www.ofcom.org.uk/consultations-and-statements/category-1/third_paytv/statement> accessed 13 August 2017. The European Commission describes recent movies and regular football events involving national teams as the essential factor or "drivers" that lead consumers to subscribe to a particular pay-TV service. *Newscorp/Telepiù* (Case COMP/M.2876) OJ C(2003)1082 [54] (EU). The ACCC similarly describes premium content as being critical to the development of pay-TV in Australia. ACCC (n 1) xiv (AU).

sport context. This chapter therefore focuses on premium sport content. It concludes by noting how the specific economic characteristics of such content continue to limit the scope for new entry into live sports broadcasting. However, the different economic characteristics of premium non-sport content in the digital era suggest greater scope for new entry, in relation to the supply of premium drama in particular.

2.2 Economic Value of the Rights to Broadcast Premium Content

In an era of content abundance, the rights to broadcast premium content remain scarce relative to demand. Together with the tendency for such rights to be granted on an exclusive basis for a specific period of time, this increases the wholesale cost to broadcasters of acquiring such rights. This is particularly the case in relation to the broadcast rights to major sporting events because of the ability of such events to attract the largest audiences, which are also less likely than premium movie or drama audiences to be fragmented by time-shifting. The commercialisation of televised sport reinforces the economic value of live sports rights and the enduring ability of a relatively small number of larger broadcasters to compete effectively for such rights. This is in contrast to the increasing opportunities for rights owners and broadcasters to monetise premium drama in the international television drama market.

2.2.1 Scarcity of major sporting events and Hollywood blockbusters

Premium sport and movie content is scarce. A fixed number of major sporting events are staged each year. The governing bodies of elite sports determine the number of teams in a league, the number of events to be staged and the maximum number of television rights to such events. By intensifying demand from broadcasters, this increases the wholesale cost to broadcasters of acquiring such rights which may be passed on to consumers in the form of higher subscription fees, reduced quality and/or less innovative services. For example, in the UK, the Premier League had a policy of making 168 of its 380

matches available to live television.[140] Limited supply saw demand reach unprecedented levels in 2015, when the Premier League agreed a record-breaking £5.1billion rights deal with Sky and British Telecommunications plc ("BT") for the three seasons from 2016/2017.[141] This represents a 70 per cent increase on Sky and BT's previous rights deal worth £3billion.[142] As will be discussed in the following chapter, all Sky and BT subscribers have since experienced slight price increases (not just sports channel subscribers).

Policies of restricting the number of live television rights to major sporting events may be subject to regulatory scrutiny. This issue arose in Virgin Media's complaint relating to the FAPL in 2014.[143] Virgin Media claimed that the 41 per cent of Premier League matches that were made available for live television was lower than some other leading European leagues.[144] It was argued that this contributes to higher prices for consumers of pay-TV packages including premium sport channels and for the pay-TV retailers of such channels.[145] As will be seen in Chapter 6, Ofcom closed the case after the Premier League made commitments to (amongst other things) increase the number of matches available for live television in the UK to a minimum of 190 per season from the start of the 2019/2020 season.[146]

Central to concerns about restrictions on the number of live television rights is that major sporting events (and, to a lesser extent premium movies) are regarded as unique. The competitive nature of sporting events means that

[140] Dan Roan, 'Premier League: Football broadcasting battle hots up' *BBC Sport* (15 December 2015) <http://www.bbc.co.uk/sport/football/35099081> accessed 13 August 2017.
[141] ibid.
[142] 'Premier League TV rights: Sky and BT pay £5.1bn for live games' *BBC Sport* (10 February 2015) <http://www.bbc.co.uk/sport/football/31357409> accessed 13 August 2017.
[143] 'Ofcom Investigation into Premier League Football Rights' (Ofcom news release, 18 November 2014) <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2014/premier-league> accessed 13 August 2017.
[144] 'Competition Act investigation into the sale of live UK audio-visual media rights to Premier League matches' (Competition and Consumer Bulletin, CW/01138/09/14, 8 August 2016).
[145] ibid.
[146] ibid.

they can never be precisely reproduced.[147] Similarly, a limited number of Hollywood blockbusters are released each year (partly due to the fact that despite technological advancements, the cost of production remains relatively high).[148] The unique quality of major sporting events and Hollywood blockbusters means that there are typically considered to be few, if any, close substitutes (i.e. products or services to which viewers may switch in response to a relative increase in price, variation in quality or other change to the conditions of supply). For instance, as discussed in Chapter 4 within the context of market definition, there are generally considered to be limited (if any) substitution possibilities for viewers between different sports, and even between different codes of the same sport.[149]

The absence of close substitutes is particularly relevant to the live coverage of major sporting events because most viewers still prefer to watch such events in real time.[150] There are a number of possible reasons for this, including a desire to participate in a shared experience or to enjoy the thrill associated with the uncertainty of outcome.[151] Time-shifting technology is therefore likely to have relatively less impact in fragmenting the audiences of such events. This is supported by Ofcom's findings in the UK that as a percentage of total viewing time-shifted viewing for sport is 8 per cent, compared to 32 per cent for drama.[152] Similarly, in the US, live viewing

[147] Alexander Scheuer and Peter Strothmann, 'Sport as Reflected in European Media Law' (2004) 14(1) *Media Law & Policy* 6, 9.

[148] There are also reports that the number of releases by the Major Hollywood Studios is in decline. Cynthia Littleton, 'Major Film Studios Prosper on the Margins' *Variety* (18 April 2013) <http://variety.com/2013/biz/news/major-film-studios-prosper-on-the-margins-1200376494/> accessed 13 August 2017.

[149] Evens, Iosifidis and Smith (n 24) 96.

[150] Robin Foster, 'Future Broadcasting Regulation' (Commissioned by the Department for Culture, Media and Sport, January 2007) para 7.3.20 <http://www.refoster.co.uk/FutureBroadcastingRegulation.pdf> accessed 25 July 2016.

[151] Lawrence A Wenner, *Media, Sports and Society* (SAGE 1989) 15.

[152] 'Communications Market Report 2015' (Ofcom, 6 August 2015) 159 <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/20668/cmr_uk_2015.pdf> accessed 13 August 2017. Across all types of content, live viewing remains the standard. In Australia, for instance, 89.6 per cent of FTA television and pay-TV is watched live-to-air each month. 'Australian Multi-Screen Report: Q4 2016' (Oztam, Nielsen and Regional Television Audience Measurement, 2017) 13

remains the standard for sport, with 95 per cent of total viewing being live.[153] This also makes live sports events especially attractive to television advertisers as, for example, ad-skipping is likely to be less prevalent than in the case of premium movies and drama.

2.2.2 Symbiotic relationship between sport and television

Sport has been referred to as "the programme for which television was invented."[154] The economic value of sports rights to broadcasters and the value of television rights to sport is significant. Concomitant with the commercialisation of sport for television is the commodification of televised sport. This refers to the increasing role of free market philosophy and principles in sport.[155] Manifestations of this include the rescheduling of sports events to maximise the value of the broadcast rights to such events, such as the scheduling in Australia of night games by the AFL and the NRL to capture prime-time audiences. There is also the repackaging of sports events for television, as with the development of international one-day cricket into World Series Cricket for the Nine Network by the late Kerry Packer.[156]

<http://www.oztam.com.au/documents/Other/Australian%20Multi%20Screen%20Report%20Q4%202016%20FINAL.pdf> accessed 11 August 2017.

[153] 'The Year in Sports Media Report: 2015' (Nielsen, 3 February 2016) <http://www.nielsen.com/us/en/insights/reports/2016/the-year-in-sports-media-report-2015.html> accessed 10 May 2016.

[154] Leonie Sandercock and Ian Turner, *Up Where, Cazaly? The Great Australian Game* (Granada, 1982) 149, as cited in Bob Stewart, 'Seeing is Believing: Television and the Transformation of Australian Cricket 1956-1975' (2005) 22(1) *Sporting Traditions* 39, 44-45.

[155] This is based on a broad interpretation of commodification that does not rely on goods actually being traded, but rather on goods being regarded as having a monetary value and regulated according to market norms. Elizabeth Anderson, *Value in Ethics and Economics* (Harvard University Press 1995) 190.

[156] See, Richard Giulianotti and Adrian Walsh, 'This Sporting Mammon: A Normative Critique of the Commodification of Sport' (2001) 28(1) *Journal of the Philosophy of Sport* 53, 55-60.

2.2.2.1 Broadcasting rights as a revenue source for sports bodies

Television rights represent a substantial revenue stream for elite sport. It has accounted for 80 per cent of the income of the UEFA Champions League,[157] and 93 per cent of the Premier League's turnover.[158] The corresponding figures in Australia are somewhat lower at 60 per cent for the NRL,[159] and 46 per cent for the AFL.[160] Lower figures are not altogether surprising given that the Australian market is smaller and anti-siphoning regulation in Australia is more comprehensive than in the UK (as discussed in detail in Chapter 6). That said, the cost of acquiring the broadcast rights to major sporting codes in Australia is increasing. For instance, the rights deal announced by the NRL in November 2015 was said to be worth AU$1.8billion.[161] This was reported to represent a 70 per cent increase on the value of the previous deal.[162] The AFL remains in the lead, however, having agreed a 6-year rights deal from 2017 with the Seven Network and Foxtel, which is said to be worth AU$2.508billion (purportedly the largest sports broadcasting deal in Australia's history).[163]

Television revenue represents a potentially important source of funds for reinvesting in sport. It may be used to develop sport at the grassroots level

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[157] 'UEFA Financial Report 2014/15' (UEFA, 25 February 2016) 6 <http://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Finance/02/33/53/52/2335352_DOWNLOAD.pdf> accessed 13 August 2017.

[158] Ben Rumsby, 'Why TV cash is vital for Premier League clubs' *The Telegraph* (13 May 2015) <http://www.telegraph.co.uk/sport/football/competitions/premier-league/11604019/Why-TV-cash-is-vital-for-Premier-League-clubs.html> accessed 13 August 2017.

[159] Broadcast revenue for the NRL for the year ended October 2015 was AU$224.991million, out of a total revenue of AU$374.142million. 'Annual Report 2015' (Australian Rugby League Commission Limited, 5 February 2016) 102 <https://www.nrl.com/portals/nrl/RadEditor/Documents/2016/NRL%20Annual%20Report_2015.pdf> accessed 13 August 2017.

[160] 'Australian Football League Annual Report 2015' (AFL, 15 February 2016) 147 <http://s.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/Annual%20Report/AFLAnnualReport2015.pdf> accessed 13 August 2017.

[161] 'NRL broadcast rights deal announced' (NRL, 27 November 2015) <http://www.nrl.com/nrl-broadcast-rights-deal-announced/tabid/10874/newsid/91023/default.aspx> accessed 6 June 2016.

[162] ibid.

[163] Australian Associated Press, 'AFL secures record $2.5bn television deal with Seven and Foxtel' *The Guardian* (18 August 2015) <https://www.theguardian.com/sport/2015/aug/18/afl-secure-record-25-billion-television-deal-with-seven-and-foxtel> accessed 13 August 2017.

and invest in local communities, for example. The Premier League is said to invest at least £1billion of its £5.1billion from television revenue for 2016/2017 to 2018/2019 in grassroots facilities, youth coaching, ticketing, improving disabled access and solidarity payments to lower leagues.[164] The potential benefit to be gained from reinvesting in sport is a standard argument raised by rights owners and broadcasters in support of exclusive broadcast rights. However, relatively little is known about the true nature, degree and longevity of the non-economic benefits which may be derived from reinvesting television revenue in sport.[165]

Contention regarding the significance of the non-economic benefits of television revenue to sport is reinforced by the fact that not all sports are considered equal. For instance, in the EU, football attracts the largest share of expenditure on sports rights. Broadcast revenue across the "Big Five" European football leagues (i.e. the Premier League, Bundesliga in Germany, La Liga in Spain, Ligue 1 in France and the Italian Serie A) increased by 8 per cent in 2014/2015 to EU€5.8billion.[166] This represents 48 per cent of total revenue.[167] However, the Premier League leads by generating more than twice the broadcast revenue of the Italian top tier and three times that of the Bundesliga 1 clubs.[168]

[164] Henry Winter, 'Premier League will invest "at least £1 billion" of bumper TV revenue in lower league and grass-roots football' *The Telegraph* (26 March 2015) <http://www.telegraph.co.uk/sport/football/competitions/premier-league/11497651/Premier-League-will-invest-at-least-1-billion-of-bumper-TV-revenue-in-lower-league-and-grass-roots-football.html> accessed 13 August 2017.

[165] Koen Breedveld and Paul Hover, 'Elite sports: what is it good for?' in Richard Bailey and Margaret Talbot, *Elite Sport and Sport-for-All: Bridging the Two Cultures?* (Routledge 2015) 15. See also, Fred Coalter, *A Wider Social Role for Sport: Who's Keeping the Score* (Routledge 2007).

[166] 'Annual Review of Football Finance 2016' (Deloitte Sports Business Group, June 2016) 8 <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2016.pdf> accessed 6 June 2016.

[167] ibid.

[168] ibid.

Televising sports events is ultimately an economic activity.[169] Rational, profit-maximising broadcasters and advertisers will therefore typically invest most heavily in events that attract the largest audiences (assuming that such audiences are also of the appropriate demographic). As a result, minority sports are likely to attract relatively little television revenue. For example, when the funding of the Australian Broadcasting Corporation ("ABC") was reduced as part of the 2014 budget cuts by the Federal Government of Australia, one of the first broadcasting deals to be affected was that with the Australian national women's professional football league, W-League.[170] In addition to qualifying the general principle that television represents an important source of funding for sport, this example suggests how the commodification of televised sport has the potential to reinforce archaic gender norms and hierarchies.[171] Notably, the return of W-League to the ABC in 2016 was financially supported by pay-TV under a partnership with Fox Sports.[172]

Even at the level of individual major sporting codes, the fact that the top teams in a league are likely to attract the lion's share of television revenue engenders a degree of inequality between such teams and lower teams.[173] By affecting how evenly teams are matched, this can undermine the principle of

[169] Case 36/74 *BNO Walrave and LJN Koch v Association Union Cycliste Internationale* [1974] ECR 1405.
[170] Richard Parkin, 'ABC cuts: "It's a really sad, sad day for women's sport"' *The Guardian* (25 November 2014) <https://www.theguardian.com/sport/blog/2014/nov/25/abc-cuts-really-sad-sad-day-womens-sport> accessed 13 August 2017.
[171] See, for example, 'Towards a Level Playing Field: Sport and Gender in Australian Media' (University of New South Wales Journalism and Media Research Centre and Media Monitors (Joint research for the Australian Sports Commission), January 2008 - July 2009) <https://www.clearinghouseforsport.gov.au/__data/assets/pdf_file/0010/595567/Towards_a_level_playing_field_-_Updated_Version.pdf> accessed 13 August 2017.
[172] 'W-League returns to ABC TV in partnership with FFA and Fox Sports' *ABC News* (15 September 2015) <http://www.abc.net.au/news/2015-09-15/w-league-returns-to-abc-tv/6777302> accessed 13 August 2017.
[173] Such inequality is reinforced by the fact that the top clubs, like Manchester United and Manchester City, get as much from foreign ownership and other commercial income as television revenue. See, 'Annual Review of Football Finance 2017' (Deloitte Sports Business Group, July 2017) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2017.pdf> accessed 13 August 2017.

"competitive balance" on which the uncertainty of outcome of sporting events relies. According to the "uncertainty of outcome" hypothesis,[174] higher levels of competitive balance (as reflected in more uncertain outcomes), increase match attendances, television audiences and overall interest.[175] Revenue sharing is one means of addressing the competitive imbalance that would otherwise be likely to prevail in the distribution of television revenue in a free market. However, this still does not necessarily mean that television revenue is distributed equally between all of the clubs in a league.

The Premier League claims that its centralised model of revenue sharing is the most equitable of Europe's major football leagues.[176] As regards UK broadcasting revenue, 50 per cent is split equally between all 20 clubs, 25 per cent is paid in merit payments, and 25 per cent is paid in facility fees each time a club's matches are broadcast in the UK.[177] International broadcast revenue is divided equally between all 20 clubs.[178] In 2014/2015, this revenue sharing model resulted in a ratio of 1.53:1 between Chelsea which finished at the top with almost £99million and Queens Park Rangers which finished at the bottom with £64.9million.[179] Inequity in the distribution of television revenue between La Liga clubs (with Barcelona and Real Madrid taking the lion's share), led the Spanish Government in 2015 to approve a new law that

[174] Simon Rottenberg, 'The Baseball Players' Labor Market' (1956) 64 *Journal of Political Economy* 242.
[175] David Forrest and Robert Simmons, 'Outcome Uncertainty and Attendance Demand in Sport: The Case of English Soccer' (2002) 51 *Journal of the Royal Statistical Society* 229; Stefan Szymanski, 'The Economic Design of Sporting Contests' (2003) 41 *Journal of Economic Literature* 1137; Jeffery Borland and Robert Macdonald, 'Demand for Sport' (2003) 19 *Oxford Review of Economic Policy* 478; Stephen Dobson and John Goddard, 'Competitive Balance, Uncertainty of Outcome and Home-Field Advantage' in Stephen Dobson and John Goddard, *The Economics of Football* (2nd edn, Cambridge University Press 2011) 42-78.
[176] 'Premier League announces payments to clubs in season 2014/15' (Premier League, 2 June 2015) <http://www.premierleague.com/en-gb/news/news/2015-16/jun/020615-premier-league-payments-to-clubs-in-season-2014-15.html> accessed 28 June 2016.
[177] 'Premier League Handbook 2017/18' (The Football Association Premier League Limited, 11 August 2017) Rule D.16 <https://www.premierleague.com/publications#!> accessed 13 August 2017.
[178] ibid Rules D.18.
[179] Premier League (n 176).

marks a shift away from an individual to a more centralised model of revenue sharing.[180]

2.2.2.2 Significance of major sporting events to television broadcasters

Major sporting events represent a significant source of revenue for the television sector. In 1996, Rupert Murdoch observed that sport "absolutely overpowers film and all other forms of entertainment in drawing viewers to television."[181] Premium sport was described as a "battering ram" for the expansion of his pay-TV empire,[182] and this is evident from Foxtel's role in relation to the Super League saga (discussed in the following chapter). Ofcom reports that sport remains the genre that generates the most television revenue for the UK multi-channel sector.[183] Fundamental to the economic value of sport to broadcasters is the mass appeal of live sports events in particular, and the ability of such events to attract large audiences.[184] In addition to the limited impact of technological developments such as time-shifting, the commercial potential of sports events is generally not impeded by cultural or language barriers.[185]

Television broadcasters are consequently willing to bid aggressively for the live broadcasting rights to major sporting events. This is demonstrated by

[180] Revenue will be distributed as follows: (i) 90 per cent to all of the clubs in La Liga, of which half will be shared equally between the 20 clubs, and the other half will be divided according to criteria such as performance and size; and (ii) the remaining 10 per cent to the second division clubs, of which 70 per cent will be divided equally between such clubs. Royal Decree-Law 5/2015 of 30 April on urgent measures in relation to the commercialisation of audiovisual rights of professional football competitions.

[181] Rupert Murdoch at the Annual General Meeting of News Corp in 1996, as cited in Ellis Cashmore and Ernest Cashmore, *Making Sense of Sports* (Taylor & Francis 2010) 400.

[182] Robert Milliken, 'Sport is Murdoch's "Battering Ram" for Pay TV' *The Independent* (16 October 1996) <http://www.independent.co.uk/sport/sport-is-murdochs-battering-ram-for-pay-tv-1358686.html> accessed 13 August 2017.

[183] Ofcom (n 152) 170.

[184] An early study by Steiner of the programming decisions of broadcasters showed how the demand for radio broadcast rights depends on the total size of the potential audience. Peter O Steiner, 'Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting' (1952) 66(2) *Quarterly Journal of Economics* 194.

[185] Ian Henry and Ling-Mei Ko, *Routledge Handbook of Sport Policy* (Routledge 2013) 168.

increasing expenditure on such rights. In 2014, expenditure on sports programming across the UK multi-channel sector was £2.12billion.[186] This represents a 21 per cent increase on 2013.[187] Sky fulfils a notable role in this trend when reference is made to the proportion of Sky's content expenditure that is dedicated to sport. In 2015, Sky invested £4.89billion in content.[188] This is not far off the £5.14billion UK television rights deal which the Premier League secured in 2015, of which Sky will pay £4.18billion over three years.[189]

The ability to attract large audiences, particularly of the young male demographic (who typically watch the least amount of television), also makes live sporting events especially valuable from an advertising revenue perspective. The US Super Bowl attracts the largest mass audience which an advertiser may reach at any one time on television.[190] The 2015 Super Bowl was the most watched US television programme in history with an average audience of 114.4million viewers (i.e. 40 per cent of the US population).[191] Advertisers are willing to pay large sums for such exposure, with 30-second advertising slots costing US$5million each.[192]

[186] Ofcom (n 152) 182-183.

[187] Ofcom suggests this is likely to be due, at least in part, to the fact that 2014 was the first full year to reflect the higher Premier League rights payments following the 2012 television rights auction. ibid 182.

[188] 'Annual Report 2015' (Sky plc, 2015) 15 <http://s3-eu-west-1.amazonaws.com/skygroup-sky-static/documents/annual-report-2015/annual-report-spreads-2015.pdf> accessed 13 August 2017.

[189] Owen Gibson, 'Sky and BT retain Premier League TV rights for record £5.14bn' *The Guardian* (10 February 2015) <https://www.theguardian.com/football/2015/feb/10/premier-league-tv-rights-sky-bt> accessed 13 August 2017.

[190] Dennis Deninger, *Sports on Television: The How and Why Behind What You See* (Routledge 2012) 164.

[191] Hazel Sheffield, 'How much do Super Bowl adverts actually cost?' *The Independent* (5 February 2016) <http://www.independent.co.uk/news/business/news/how-much-do-super-bowl-adverts-actually-cost-a6855426.html> accessed 13 August 2017.

[192] David Millward, 'Super Bowl: the biggest advertising show on earth' *The Telegraph* (6 February 2016) <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/12139111/Superbowl-the-biggest-advertising-show-on-earth.html> accessed 13 August 2017.

By contrast, 30-second advertising slots in the AFL and the NRL grand finals each cost around AU$135,000 and AU$100,000, respectively.[193] Such figures also appear low by UK standards. For example, a 30-second advertising slot during coverage of England matches on Independent Television ("ITV") during the 2014 World Cup cost between £275,000 and £300,000 (AU$496,000 and AU$541,000).[194] However, the figures in Australia compare reasonably well having regard to the relative size of the UK and Australian markets, populations and audience ratings. For instance, ITV's coverage of England versus Uruguay in the 2014 World Cup attracted an average of 18.2million (and a peak of more than 20million) viewers.[195] This compares to peak audience ratings of around 2.64million for the 2015 AFL grand final and 4.42million for the first NRL State of Origin match of 2016.[196]

2.2.3 Monetising premium drama in the international television drama market

With the proliferation of channels aided by the growth of online streaming, there is increasing demand for content and particularly premium drama. This is greatly influenced by the fact that the business models of SVOD platforms are based on the exclusive supply of original drama series. From the perspective of viewers living in a society in which the immediacy of news (and the issue of "fake" news) gives the impression at least of increasingly troubled times, drama offers a means of escapism and an opportunity to develop our understanding of the world around us. Compared to movies, dramas offer a relatively cost effective way of meeting such demand. Also, as already

[193] Darren Davidson, 'State of Origin's ad haul stirs rights split talk' *The Australian* (28 May 2015) <http://www.theaustralian.com.au/business/media/state-of-origins-ad-haul-stirs-rights-split-talk/news-story/0b5961ca67bcc5a5a340dcdcea42d18d> accessed 13 August 2017.

[194] 'Winners of the World Cup: UK industries hopeful for a big home win' (Ibis World, June 2014) 3 <http://us7.siteground.us/~media243/media.ibisworld.co.uk/wp-content/uploads/2014/07/UK-Special-Report_June-2014.pdf> accessed 7 August 2016.

[195] Mark Sweney, 'The real World Cup winners: BBC or ITV?' *The Guardian* (11 July 2014) <https://www.theguardian.com/media/2014/jul/11/world-cup-2014-bbc-v-itv> accessed 13 August 2017.

[196] Michael Bodey, 'State of Origin scores ratings record' *The Australian* (2 June 2016) <http://www.theaustralian.com.au/business/media/state-of-origin-scores-ratings-record/news-story/c1f34e1c1f523f4e63a9026e7d9aa935> accessed 13 August 2017.

indicated, dramas are not affected by the scarcity issue in the same way as major sporting events or Hollywood blockbusters. Dramas can also quite easily be adapted via subtitles and language selection settings to accommodate the needs of a multicultural audience.

The increasing appetite around the world for premium drama expands the opportunities for rights owners and broadcasters to monetise premium drama. At the same time, as a likely consequence of the increasing amount of drama aimed at a multicultural audience, local broadcasters may respond by becoming even more local in their propositions. As already suggested, this offers a means by which broadcasters may differentiate their services from that of leading US-based networks and SVOD platforms in particular. In order to compete effectively, however, the challenge lies in broadcasters "premiumising" local content, such as by enabling the personalisation of services in a similar vein to that made possible by SVOD platforms. Evidence of these trends is apparent from the discussion in the following chapter on the changing broadcasting landscapes in the UK and Australia.

2.3 Specific Issues Raised by the Possible Migration of Sport to Pay-TV

Concerns about the commercialisation and commodification of sport for television only arise if televised sport is regarded as distinguishable from ordinary market goods. For this purpose, a distinction may be drawn by reference to differences in the relationships between sporting events and viewers on the one hand, and between consumers and ordinary market goods on the other. Televised sport may be regarded in economic terms as a "public good" and/or a "merit good" which economic theory dictates are typically under-consumed in a free market. The migration of the coverage of sports events to pay-TV may therefore be perceived as a form of market failure. This is subject, however, to the argument made below that televised sport may be more appropriately defined as a "club good", which has policy implications

for the basis on which televised sport may (or may not) be distinguished from ordinary market goods. There are also the socio-cultural functions of broadcasting sport on FTA television.

2.3.1 Product distinctions between televised sport and ordinary market goods

The interrelationships between spectators, sports institutions and sporting events can be distinguished from the relationship between consumers and the suppliers of ordinary market goods.[197] Unlike ordinary market goods, sporting events require the cooperation of two or more teams/competitors and the attractiveness of the product to viewers depends on the perceived quality of the game.[198] As already noted, the success of sporting events relies on "competitive balance" which is unlikely to be ensured in a free market. The principle of the "survival of the fittest" means that a free market would be likely to lead to outcomes that are predictable and therefore uncompelling to viewers.[199] Hence measures such as revenue sharing to achieve greater parity between teams by "levelling the playing field". The unpredictability this may generate was exemplified in the 2015-2016 Premier League, which was won by underdogs Leicester City against odds of up to 5000/1.[200]

The quality of a sporting event depends upon the closeness of the scores, the number of "star" players involved, the importance of the match and its perceived entertainment value.[201] Its external value is influenced by the passion, loyalty and identification that spectators demonstrate for the

[197] RK Stewart, 'The Economic Development of the Victorian Football League 1960-1984' (1985) 1(2) *Sporting Traditions* 2, 6.
[198] ibid.
[199] ibid.
[200] Jack de Menezes, 'Leicester win the Premier League: Bookmakers' set to lose over £25m as lucky punters bag £100,000 winnings' *The Independent* (3 May 2016) <http://www.independent.co.uk/sport/football/premier-league/leicester-win-the-premier-league-odds-bookmakers-to-lose-over-25m-lucky-punters-bag-100000-pay-out-a7010726.html> accessed 13 August 2017.
[201] Stewart (n 197).

event.[202] So in addition to consuming them, spectators are important contributors to the quality of sporting events.[203] The importance of having a strong stadium presence was exemplified by the decision of Liverpool to revise its plan to increase ticket prices, after an estimated 10,000 Liverpool fans walked out in protest in the 77th minute of the match against Sunderland on 6 February 2016.[204] The ultimate objective of competitors in sport is to win, not simply to maximise profit.[205] However, the latter is significant for enabling reinvestment in the means to winning.

2.3.1.1 Re-characterising televised sport from a public good into a club good

Televised sporting events can bear the public good characteristics of being non-rivalrous in consumption and non-excludable.[206] The consumption of a public good by one individual does not prevent others from consuming it and it is not possible to exclude anyone from doing so once it has been made available for consumption. With terrestrial broadcasting in the analogue era, televised sports events were both non-rivalrous in consumption and non-excludable. Once an event was transmitted, it was possible for anyone with a television set to receive the transmission without paying for it. One viewer watching an event does not prevent others from doing so. Whilst television broadcasting remains non-rivalrous in consumption, the encryption of transmission signals via pay-TV means that events which were previously available on FTA television may become available exclusively to pay-TV subscribers. In this sense, such television coverage becomes a "club good".[207]

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[202] ibid 7.
[203] ibid.
[204] Andy Hunter, 'Liverpool owner backs down on ticket prices and apologises to fans' *The Guardian* (10 February 2016) <https://www.theguardian.com/football/2016/feb/10/liverpool-back-down-ticket-prices-77> accessed 13 August 2017.
[205] Stewart (n 197) 7.
[206] Paul A Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36(4) *Review of Economics and Statistics* 387; Paul A Samuelson, 'Diagrammatic Exposition of a Theory of Public Expenditure' (1955) 37(4) *Review of Economics and Statistics* 350.
[207] A "public good" becomes a "club good" where it is non-rivalrous in consumption but there is a means of excluding non-payers. James M Buchanan, 'An Economic Theory of Clubs' (1965) 32(125) *Economica* 1.

There are a number of policy implications in characterising televised sport as a club good rather than a public good. A welfare loss arises where some viewers are prevented from watching events who could otherwise have done so without affecting the ability of other viewers to watch them.[208] At the same time, however, competing suppliers increases the possibility for competition and innovation, and improved quality and variety of content. Also, the problem of "lowest common denominator" broadcasting,[209] in the case of advertising-funded broadcasting, may be avoided. It is therefore arguable that where sports coverage migrates to pay-TV, the "public good" characterisation of televised sport ceases to represent a legitimate basis on which to distinguish televised sport from ordinary market goods. The supply of club goods is arguably a matter for property rights rather than sector-specific regulation.

2.3.1.2 Characterisation of televised sporting events as merit goods

Merit goods are considered to be intrinsically desirable but undervalued by individuals, on the basis that individuals are considered to need such goods irrespective of their ability or willingness to pay for them.[210] In a free market, the supply and consumption of merit goods are unlikely to be at socially optimal levels. Where the coverage of a sporting event migrates from FTA television to pay-TV, a direct pecuniary cost is imposed on viewers (in acquiring a STB and subscription fees) that was not previously imposed. Since some viewers will be unable or unwilling to incur this cost, fewer viewers will

[208] Dobson and Goddard (n 175) 176.

[209] See, Beebe JH, 'Institutional Structure and Program Choices in Television Markets' (1977) 91(1) *Quarterly Journal of Economics* 15.

[210] Richard A Musgrave, 'A Multiple Theory of Budget Determination' (1957) 17(3) *FinanzArchiv New Series* 333; Richard A Musgrave, *The Theory of Public Finance: A Study in Public Economy* (McGraw-Hill 1959) 13-15.

have access to the event than if it was made available on FTA television. This may be perceived in terms of market failure.[211]

As a consequence of the positive externalities that may be generated by making televised sporting events available on FTA television (reinforced by the socio-cultural functions of televised sport (discussed below)), restricting the ability of some viewers to watch such events may give rise to a welfare loss.[212] Sporting events may be characterised as merit goods on the basis that community demand is high due to the social benefits,[213] but the normal market cost of paying to watch such events is likely to be intolerable for some viewers.[214] However, the merit good characterisation of televised sporting events assumes a paternalistic view of the state in which the government/legislator is regarded as better placed than viewers to assess the value of such events. It is also based on the non-economic value of televised sport as a consequence of the socio-cultural functions of sport on traditional broadcast television.

2.3.2 Socio-cultural functions of broadcasting sport on free-to-air television

The value of televised sport is rarely, if ever, defined solely in economic terms. Sport is widely regarded as capable of fulfilling a fundamental role in uniting people, and in developing a shared sense of national and cultural identity. In the words of Baron Pierre de Coubertin, founder of the modern Olympic Games, "[sport] is not a luxury activity, or an activity for the idle […] Sport is part of every man and woman's heritage and its absence can never be compensated for."[215] Sport is said to be based on "fundamental social,

[211] Anthony Kerr, Matthew Nicholson and Merryn Sherwood, *Sport and the Media: Managing the Nexus* (Routledge 2015) 100.
[212] Dobson and Goddard (n 175).
[213] Kerr, Nicholson and Sherwood (n 211).
[214] Ewen J Michael, *Public Policy: The Competitive Framework* (Oxford University Press 2006) 63.
[215] Conrado D Corral, *Pierre de Coubertin: The Olympic Humanist* (International Olympic Committee and International Pierre de Coubertin Committee, 1994) 27, as cited in Jeroen Heijmans and Bill Mallon, *Historical Dictionary of the Olympic Movement* (Scarecrow Press 2011) 8.

educational and cultural values [making] for integration, involvement in the life of society, tolerance, acceptance of differences and compliance with rules."[216]

Integration and social cohesion are especially pertinent in the EU given the role that is attributed to sport in developing a shared cultural identity between Member States.[217] The unifying capability of sport is also important in Australia. Hailed as a "nation of good sports", it is said to have a special affinity with sport.[218] For example, the day of the Melbourne Cup, described as "the race that stops the nation", has been an annual public holiday in Victoria since 1877.[219] With respect to Australia's demographically and culturally diverse population, reinvesting television revenue in local communities may also contribute to the role of sport in uniting Australia's indigenous communities.[220]

Given the separate roles of sport and television in popular culture, it is unsurprising that the television broadcasting of sport has come to be so closely associated with concepts of national and cultural identity.[221] It was noted in the 1977 report of the Annan Committee on the future of UK broadcasting how television "links people, gives the mass audience common

[216] Declaration on incorporating the specific characteristics of sport and its social functions into the implementation of common policies (European Council, Nice, 2000).
[217] Recommendation No.R (92) 13 Rev of the Committee of Ministers to Member States on the Revised European Sports Charter, adopted on 24 September 1992 at the 480th meeting of the Ministers' Deputies and revised at the 752nd meeting on 16 May 2001, para 6.
[218] 'Australia in Brief' (Australian Government Department of Foreign Affairs and Trade, 15 October 2014) 58; 'Australian Citizenship: Our Common Bond' (Commonwealth of Australia, 2014) 43.
[219] Vivienne McCredie, *The Race That Stops the Nation: And Other Verses* (Hydro Ideas 2005).
[220] 'Submission to the Productivity Commission – Inquiry into Broadcasting' (AFL, December 1999) 11 <http://www.pc.gov.au/inquiries/completed/broadcasting/submissions/subdr240/subdr240.pdf> accessed 13 August 2017.
[221] For instance, such is the association between rugby and Welsh identity, that access to the Rugby Union Six Nations on FTA television in Wales has been described as a "national birthright". David Williamson, 'The Six Nations is part of our "national birthright" and must stay free-to-air, says Shadow Welsh Secretary Owen Smith' *Wales Online* (26 June 2015) <http://www.walesonline.co.uk/news/wales-news/six-nations-part-national-birthright-9535821> accessed 13 August 2017.

topics of conversation, makes them realise that, in experiencing similar emotions, they all belong to the same nation."[222] The Council of Europe has similarly identified how television is an important medium for encouraging the provision of appropriate opportunities for the practice of sport at all levels of experience and for the benefit of all citizens.[223] In Australia, it is an objective of the BSA "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity".[224] As the majority of the High Court of Australia ("HCA") noted in *Project Blue Sky*,[225] within the context of defining "Australianness" for the purposes of programme quotas in the Australian Content Standard,[226] "[a] program will contain Australian content if it shows aspects of the […] sporting activities of Australians".[227]

The pervasiveness of traditional broadcast television renders it an ideal platform for achieving the social and cultural functions of sport, by exposing sporting events to as large and wide an audience as possible.[228] In the analogue era, the perceived importance of sport on television can be related to the mass audience and immediacy of FTA television. The availability of fewer channels and one-way delivery of content meant that more viewers were likely to simultaneously watch the same programmes. However, audience fragmentation in the digital era (particularly as a result of the increasing consumption of live or near-live sports coverage in highlight format on mobile devices) undermines the strength of the argument that intervening

[222] 'Report of the Committee on the Future of Broadcasting' (HMSO Cmnd 6753, March 1977) para 3.2.
[223] Recommendation No.R (80) 1 of the Committee of Ministers to Member States, adopted by the Committee of Ministers on 24 January 1980 at the 313th meeting of the Ministers' Deputies.
[224] Broadcasting Services Act 1992, s 3(e).
[225] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28.
[226] Broadcasting Services (Australian Content) Standard 2005, as amended by Broadcasting Services (Australian Content) Standard Variation 2009 (No.1) and Broadcasting Services (Australian Content) Standard Variation 2010 (No.1).
[227] *Project Blue Sky* (n 225) [88].
[228] 'Parliamentary Debates' (Commonwealth of Australia, House of Representatives no.14, 5 April 1978) 996.

in the market to retain sports coverage on FTA television serves the public interest.[229]

2.4 Role of Premium Content in the Development of Pay-TV

Due to its mass appeal and the willingness of viewers to pay to watch it, premium content fulfils a key role in the development of pay-TV. However, the multi-sided nature of pay-TV providers means that access to premium content presents challenges as well as opportunities for new entrants. Acquiring the rights to broadcast premium content or producing premium content typically requires significant investment, whether from subscription fees and/or advertising revenue (or licence fees or state subsidies in the case of PSB). Externalities between rights owners and viewers, and between viewers and advertisers, can confer first-mover advantages and entrench the market positions of incumbent pay-TV providers. This reinforces the challenge for new entrants in competing in the retail supply of premium content to viewers.

2.4.1 Network externalities in pay-TV

In bearing the characteristics of a multi-sided platform, a pay-TV provider enables interactions between rights owners, viewers and advertisers which are indirectly connected by externalities that may not otherwise be sufficiently internalised. As with multi-sided platforms generally, positive and negative externalities between these different sides indirectly affect the value of each of the sides. The aim for pay-TV providers is to "get all sides on board". The task of assessing externalities between the various sides in order to achieve this, however, is further complicated by the ability of rights owners to supply viewers directly and the ability of viewers to skip/avoid advertisements.

[229] The challenge of defining the concept of the public interest is considered later in the thesis.

2.4.1.1 Complementary interactions between rights owners and viewers

An increase in audience exposure generates positive externalities for rights owners by increasing the value of their rights. The Internet and mobile technology provide rights owners with the possibility of connecting directly with viewers and thereby bypassing the networks of traditional pay-TV providers.[230] The direct-to-viewer model of distribution is well-established in the context of premium sport content. In the UK, Manchester United and Chelsea were amongst the first football clubs to launch their own dedicated channels, MUTV in 1998 and Chelsea TV in 2001. Direct subscription services have, more recently, also been launched by some of the Major Hollywood Studios. Examples include Disney's launch of DisneyLife in the UK in 2015,[231] and NBCUniversal's launch of the reality show SVOD service Hayu in the UK, Ireland and Australia in 2016.[232]

Traditional pay-TV networks may still be used as part of a multi-media, multi-platform distribution strategy. However, where rights owners are able to capture value from dealing directly with viewers, a positive externality may flow from rights owners to viewers.[233] This represents a complementary interaction between rights owners and viewers. The benefits of increased competition in retail distribution may be passed on to viewers in the form of lower prices, better quality and/or more innovative services. However, dealing directly with viewers entails greater risk for rights owners, including fewer financial guarantees and higher transaction costs.[234] As a result of this, a negative externality may flow from rights owners to viewers.

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[230] The regulatory implications of the growth in the direct-to-viewer model of distribution are considered in Chapter 6 of the thesis.

[231] Mark Sweney, 'Disney to launch UK film and TV streaming service for £9.99 a month' *The Guardian* (22 October 2015) <https://www.theguardian.com/media/2015/oct/22/disney-uk-film-tv-streaming-disneylife-frozen-toy-story> accessed 13 August 2017.

[232] Leo Barraclough, 'NBCUniversal Launches Reality Streaming Service Hayu in U.K., Ireland, Australia' *Variety* (11 February 2016) <http://variety.com/2016/digital/global/nbcuniversal-reality-streaming-service-hayu-uk-ireland-australia-1201703166/> accessed 13 August 2017.

[233] Evens, Iosifidis and Smith (n 24) 46.

[234] ibid.

2.4.1.2 Non-complementary interactions between viewers and advertisers

A positive externality flows from viewers to advertisers.[235] The size and composition of television audiences have a positive effect on advertisers' payoffs.[236] Subject to the appropriate demographic and attention value of the audience, advertisers prefer larger audiences. Positive externalities may also flow from advertisers to viewers. Viewers may indirectly value the quality of the content which may be produced or acquired through the reinvestment of advertising revenue. Also, viewers may directly value advertisements that are informative or entertaining.

Generally speaking, however, viewers are considered to be averse to advertisements on television.[237] This gives rise to a non-complementary interaction between advertisers and viewers. Television advertising is said to impose a nuisance cost for viewers. If this nuisance cost outweighs the positive benefits to viewers, a negative externality will flow from advertisers to viewers.[238] Hence, the imposition in jurisdictions (including the UK/EU and Australia) of restrictions on the volume and scheduling of advertisements,[239] to protect viewers from excessive amounts of advertising and maintain the

[235] Kyle Bagwell, 'The Economic Analysis of Advertising' in Mark Armstrong and Robert H Porter, *Handbook of Industrial Organization*, vol 3 (North-Holland Elsevier 2007) 1822.

[236] Robert G Picard and Steven S Wildman, *Handbook on the Economics of the Media* (Edward Elgar Publishing 2015) 7. See, Germà Bel and Laia Domènech, 'What Influences Advertising Price in Television Channels? An Empirical Analysis on the Spanish Market' (2009) 22 *Journal of Media Economics* 164.

[237] See, Simon P Anderson and Jean J Gabszewicz, 'The Media and Advertising: A Tale of Two-Sided Markets' in Victor A Ginsburgh and David Throsby, *Handbook of the Economics of Art and Culture*, vol 1 (Elsevier 2006) 567-614; Anthony Dukes and Esther Gal-Or, 'Minimum Differentiation in Commercial Media Markets' (2003) 12(3) *Journal of Economics and Management Strategy* 291. However, some studies differentiate between ad-loving, ad-averse and neutral viewers. See, for example, Jorge Ferrando, Jean J Gabszewicz, Didier Laussel and Nathelie Sonnac, 'Intermarket Network Externalities and Competition: An Application to the Media Industry' (2008) 4 *International Journal of Economic Theory* 357; Hans J Kind and Frank Stähler, 'Market Shares in Two-sided Media Industries' (2010) 166(2) *Journal of Institutional and Theoretical Economics* 205.

[238] Bagwell (n 235).

[239] The volume of advertising on UK television is subject to Ofcom's Code on the Scheduling and Amount of Advertising and regulation at the EU level under the AVMSD. AVMSD (n 92) art 23. Television advertising in Australia is subject to a number of codes of practice, including the Commercial Television Industry Code of Practice for FTA television and the Australian Subscription Television and Radio Association's Code of Practice for pay-TV.

quality of the viewing experience. However, recent studies call into question the trade-off between advertising and viewers by finding that advertising restrictions may benefit privately-owned rivals not subject to the restrictions because the profits of media outlets can increase even where the nuisance cost to viewers increases.[240] This is based on the significance of advertising revenue as a source for funding high quality content and the overriding interest of viewers in such content.

The risk of negative externalities flowing from advertisers to viewers is likely to be reduced in the digital era by the ability of viewers to use DVRs and ad-skipping technology to avoid watching advertisements. Also, the Netflix model of advertising-free streaming offers viewers the opportunity to consume an increasing amount of premium content without the need to use such technology. Streaming content via Netflix reportedly saves viewers around 160 hours of advertising time per year.[241] Some broadcasters have cut back on advertising time in an attempt to lure back the Netflix generation to traditional broadcast television.[242] All of this, however, is likely to have ramifications for the ability of most broadcasters to monetise their audiences.

It has been suggested that live sports events remain the form of premium content for which ad-skipping would appear to pose the least risk because most viewers prefer to watch such events in real time. Also, advertisement-

[240] Markus Reisinger, 'Platform Competition for Advertisers and Users in Media Markets' (2012) 30(2) *International Journal of Industrial Organization* 243; Tanja Greiner and Marco Sahm, 'How Effective Are Advertising Bans? On the Demand for Quality in Two-Sided Media Markets', 29 February 2016 <https://www.econstor.eu/bitstream/10419/145724/1/VfS_2016_pid_6733.pdf> accessed 26 June 2017.

[241] Nathan McAlone, 'Netflix Saves Its Subscribers from 160 Hours of Commercials Per Year' *UK Business Insider* (10 May 2016) <http://uk.businessinsider.com/netflix-subscribers-save-160-hours-of-commercials-compared-to-cable-2016-5> accessed 28 July 2017.

[242] The possible effects of this are likely to be most pronounced in countries where television advertising is more prolific, such as the US where a typical hour of cable television includes 15 minutes and 38 seconds of advertising time. 'Advertising and Audiences: State of the Media' (Nielsen, May 2014) 14 <https://www.nielsen.com/content/dam/nielsenglobal/jp/docs/report/2014/Nielsen_Advertising_and_%20Audiences%20Report-FINAL.pdf> accessed 13 August 2017.

free SVOD platforms like Netflix do not currently provide live coverage of sports events. According to its Chief Content Officer, Netflix does not currently have any plans to enter the sports rights market.[243] Though there does not appear to be any technological reason why Netflix would not, at some point, go live.[244]

In an attempt to reduce their exposure to advertising, viewers may even consider switching supplier. However, the scope for switching may be limited in practice by the cost to the individual viewer of acquiring another STB and any penalties/charges which may be incurred for terminating their existing subscription. Also, there may not be any alternative suppliers of certain content, such as live coverage of sports events where broadcast rights been licensed on an exclusive basis. In this respect, the opportunities for switching are likely to be greater in relation to premium non-sport content (particularly in view of the growth of online streaming and increasing investment in original drama).

Pay-TV providers must have regard to these possibilities and to the fact that the market for advertisers is also changing. The opportunity to advertise across a range of media and devices means that advertising budgets are being spread more broadly. Zentner finds that increases in Internet penetration are negatively correlated with changes in advertising expenditure on television.[245] In 2009, the UK reportedly became the first major economy in which advertisers spent more on Internet advertising than on television

[243] 'Edited Transcript: NFLX - Q1 2016 Netflix Inc Earnings Call' (Thomson Reuters, 18 April 2016) 5 <http://files.shareholder.com/downloads/NFLX/1550531779x0x888591/598D09BB-3F29-451C-8C78-A22ECD827E7E/NFLX-Transcript-2016-04-18T21_00.pdf> accessed 18 August 2017.

[244] Netflix has already started to supply near-live content in the form of the talk show Chelsea Handler, which is streamed a couple of hours after being recorded live. ibid.

[245] Alejandro Zentner, 'Internet Adoption and Advertising Expenditures on Traditional Media: An Empirical Analysis Using a Panel of Countries' (2012) 21(4) *Journal of Economics and Management Strategy* 913.

advertising.[246] However, traditional broadcast television remains a crucial advertising medium in the UK, with adspend growing by 7.3 per cent to reach a record £5.3billion in 2015, followed by forecasts of continued growth in total television adspend.[247] This is also the case in Australia where television is reported to remain the most powerful paid advertising platform.[248]

2.4.2 "Chicken and egg" problem in securing the rights to premium content

As multi-sided platforms, pay-TV providers need to adopt adequate pricing structures on each side of the market in order to achieve minimum efficient scale. It is necessary to attract a sufficient number or critical mass of viewers in order to receive the revenue from subscription fees and advertising revenue, where relevant, to invest in content that will attract viewers. To achieve critical mass, pay-TV providers need to supply a sufficient amount of content that viewers find appealing. Supplying such content requires the necessary investment to produce or acquire the rights to such content.

The more viewers that a channel attracts, the more appealing it is likely to be to advertisers because the more attention an advert receives, the more persuasion may occur.[249] This is subject to the demographic of the audience, and the effects of ad-skipping and/or multi-homing by viewers. By reducing audience size and/or the quality of viewer attention, ad-skipping and multi-homing can impose a downward pressure on advertising rates for

[246] Mark Sweney, 'Internet overtakes television to become biggest advertising sector in the UK' *The Guardian* (30 September 2009) <https://www.theguardian.com/media/2009/sep/30/internet-biggest-uk-advertising-sector> accessed 13 August 2017.
[247] 'UK advertising spend passes £20bn as growth hits five-year high' (Advertising Association/Warc Expenditure Report 2015, 26 April 2016) 3 <http://expenditurereport.warc.com/FreeContent/Q4_2015.pdf> accessed 23 April 2017.
[248] 'Ads on TV Drive More Action than any Other Paid Media Online' (Nielsen, 16 February 2016) <http://www.nielsen.com/au/en/insights/news/2016/ads-on-tv-drive-more-action-than-any-other-paid-media.html> accessed 23 April 2017.
[249] Thales S Teixeira, 'The Rising Cost of Consumer Attention: Why You Should Care, and What You Can Do About It' (Harvard Business School working paper 14-055, 17 January 2014) 4 <http://www.hbs.edu/faculty/Publication%20Files/14-055_2ef21e7e-7529-4864-b0f0-c64e4169e17f.pdf> accessed 13 August 2017.

broadcasters. Multi-homing by advertisers may also eliminate competition between broadcasters for such advertisers.[250] Meanwhile, some empirical studies suggest that competition remains strong between broadcasters on the advertising-side, with larger broadcasters still able to command a premium as regards advertising revenue per viewer.[251]

Increasing the size of an audience involves providing additional appealing content and this, in turn, requires further investment for the production or acquisition of such content, and so on. A pay-TV provider will not be able to achieve critical mass if it does not attract adequate revenue from viewer subscriptions (and advertising if applicable), and vice versa. This gives rise to the so-called "chicken and egg" problem.[252] It will be seen in the following chapter that the effect of this in the analogue era was to entrench the market positions of a small number of traditional pay-TV providers in both the UK and Australia. However, it will be suggested that the "chicken and egg" problem is alleviated in the digital era, particularly by the growth of online streaming and the rise of premium drama.

2.5 Conclusions

By its very nature, premium content presents both opportunities and challenges for pay-TV providers. The tendency for broadcast rights to be granted on an exclusive basis for a specific period of time reinforces the scarcity of premium content (and premium sport content in particular). The possible absence of close substitutes for major sporting events is reinforced by the fact that most viewers still prefer to watch such events live.

[250] Anderson and Coate (n 55); Mark Armstrong and Julian Wright, 'Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts' (2007) 32(2) *Economic Theory* 353.
[251] Keith Brown and George Williams, 'Consolidation and Advertising Prices in Local Radio Markets' (Federal Communications Commission, September 2002) <https://apps.fcc.gov/edocs_public/attachmatch/DOC-226838A9.pdf> accessed 13 August 2017; Keith Brown and Peter J Alexander, 'Market Structure, Viewer Welfare and Advertising Rates in Local Television Markets' (2005) 86 *Economic Letters* 331.
[252] See, Caillaud and Jullien (2003) (n 60).

Nevertheless, the increasing consumption of sports coverage in real time "on the move" via mobile devices and social media begs the question as to what constitutes watching content "live". This will have implications for market definition and the assessment of market power by traditional pay-TV providers holding exclusive live sports rights (as discussed in Chapter 4). The resulting upward pressure on the wholesale cost of acquiring such rights will be seen in the following chapter in relation to the escalating cost of sports rights in the UK and Australia.

Scarcity does not arise as such an issue within the context of premium drama. The effects of this on the relatively wide availability of premium drama is demonstrated in the following chapter by the higher degree of new entry into the supply of premium drama in both the UK and Australia. The increasing opportunities to monetise premium drama in the international television drama market fulfils an important role in this trend. Even within the context of premium drama, exclusivity arguably remains a definitive characteristic of effective competition. The remainder of the thesis focuses on ensuring that this and the resulting tendency towards market concentration are given due consideration in the assessment of market power in the premium pay-TV context.

CHAPTER 3

PREMIUM CONTENT AND PAY-TV DEVELOPMENTS IN THE UK AND AUSTRALIA

3.1 Introduction

Subject to the restrictions imposed by anti-siphoning regulation, the coverage of major sporting events in both the UK and Australia has been dominated by a small number of traditional pay-TV providers (specifically Sky in the UK and Foxtel in Australia). New entry by established telecommunications service providers, with their ability to bundle pay-TV with other communications services, has the potential to undermine the market positions of Sky and Foxtel in relation to live sports broadcasting. However, the greatest change in the competitive dynamic for the retail supply of premium content to viewers arguably arises in relation to premium drama. This is due to the growth of online streaming and the centrality of premium drama within the business models of SVOD platforms.

The entry of BT in the UK and Optus in Australia into the sports rights market markedly alters the competitive dynamic for the retail supply of premium sport content in the UK and, to a lesser extent, in Australia. This may be partly due to the greater opportunities for competition that exist in the larger UK market. It is also likely to be influenced by the more comprehensive anti-siphoning regulation of premium sport content that persists in Australia (as will be discussed in Chapter 6). However, the growth of online streaming in the UK and Australia suggests more comparable effects on the competitive landscapes in the two countries as regards the supply of premium movies and drama. This demonstrates how suppliers are competing more strongly on innovation (than on price) in an attempt to differentiate their services, as firms do in dynamic markets.

3.2 Impact of Pay-TV on the Broadcasting Landscapes in the UK and Australia

Television broadcasting emerged in both the UK and Australia primarily as a public service. The introduction of satellite in the UK and cable in Australia saw the gradual growth of traditional pay-TV. Despite the relatively stronger tradition of PSB in the UK, traditional pay-TV penetration exceeds that in Australia. This can be partly explained by the technical and physical constraints that the large geographic size and dispersed population of Australia impose on the laying of network infrastructure. Despite this, new entry by established telecommunications service providers and SVOD platforms suggests a degree of convergence between the nature of the competitive landscapes in the two countries. This includes the enduring resilience of FTA television in both the UK and Australia, as public service broadcasters and commercial FTA broadcasters seek to adapt to the growth of online streaming.

3.2.1 Role of pay-TV on the development of broadcasting in the UK

Broadcasting in the UK was founded as a FTA public service based on the Reithian tradition to "inform, educate and entertain".[253] These values were conferred on the the UK's first and primary public service broadcaster, the British Broadcasting Corporation ("BBC"),[254] by its first Director-General, John Reith. The BBC was established in 1927, as a vertically-integrated content producer, channel provider and broadcaster, to provide broadcasting services as a public utility.[255] Its Charter specifies that the BBC's main activities include

[253] Reith (n 120).

[254] The other PSB channel providers in the UK include the Channel 4 Corporation, ITV plc, STV Group plc, UTV Media plc, S4C and Channel 5. The PSB channels in the UK include BBC One, BBC Two, BBC Three, BBC Four, BBC News, CBBC, CBeebies, BBC Parliament, BBC HD services, ITV, STV, UTV, Channel 4, Five, S4C and BBC Alba. 'Public Service Content in a Connected Society: Ofcom's Third Review of Public Service Broadcasting' (Ofcom, 15 December 2014) 1 <https://www.ofcom.org.uk/__data/assets/pdf_file/0019/42580/psbr-3.pdf> accessed 13 August 2017.

[255] BBC Royal Charter 1927, cl 3(a) <http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/archive/1927.pdf> accessed 13 August 2017. The BBC's 1937 Royal Charter extended the public utility service of the BBC from radio to include television. BBC Royal Charter 1937, cl 3(a)

to promote its "public purposes".[256] Notably, sport is considered to fulfil a vital role in the BBC's public purposes,[257] by bringing audiences together to share the experience of watching events of national importance and promoting minority sports.[258]

The BBC enjoyed what Reith describes as the "brute force of monopoly",[259] until the introduction of commercial FTA television in 1955,[260] in the form of ITV.[261] As a FTA broadcaster, ITV delivers content on traditional broadcast television and on-demand via the ITV Hub. Whilst funded by advertising and sponsorship, ITV still has a public service remit to provide "a range of high quality and diverse programming."[262] The ITV's duopoly with the BBC existed until the launch of Channel 4 in 1982. Publicly-owned but commercially-funded, Channel 4 has the same general public service remit as ITV. It is also required to provide innovative programming of a distinctive character and educative value that appeals to a culturally diverse society.[263] The UK's fourth FTA network, Channel 5 ("Five"), which is owned by Viacom, was launched in 1997. Five has the same public service remit as ITV.[264]

<http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/archive/1937.pdf> accessed 13 August 2017.

[256] The BBC's "public purposes" include sustaining citizenship and civil society; promoting education; stimulating creativity and cultural excellence; representing the UK and its communities; bringing the UK to the World and vice versa; and helping to deliver to the public the benefit of emerging communications technologies and services. 'Copy of Royal Charter for the continuance of the British Broadcasting Corporation' (Department for Culture, Media and Sport, 2006) arts 4 and 5(1) <http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf> accessed 13 August 2017.

[257] Select Committee on the BBC Charter Review, *Further Issues for BBC Charter Review* (HL 2005-06, 128-II) para 108.

[258] ibid para 109.

[259] John CW Reith, *Into the Wind* (Hodder & Stoughton 1949) 99.

[260] On the introduction of competition in UK broadcasting, see Asa Briggs, *The History of Broadcasting in the United Kingdom: Competition*, vol 5 (Oxford University Press 1995) 18-19.

[261] Television Act 1954.

[262] Communications Act 2003, s 265(2).

[263] ibid s 265(3).

[264] ibid s 265(2).

3.2.1.1 Introduction of pay-TV in the UK and the growth of Sky

Despite the UK's strong tradition of PSB, traditional pay-TV has achieved a reasonably high degree of penetration within a relatively short period of time. Europe's first satellite service, British Satellite Broadcasting ("BSB") was launched in 1982. BSB merged in 1990 with a second non-domestic satellite service,[265] Sky Television plc,[266] to form Sky, in whose parent company Twenty-First Century Fox holds a 39 per cent share.[267] In 2006, the UK's two then largest cable operators, National Transcommunications Limited and Telewest, merged to form Virgin Media Inc ("Virgin Media"). Virgin Media is now the UK's main cable operator with 5.7million cable customers.[268] As the UK's main pay-TV providers, Sky and Virgin Media, together with telecommunications service providers BT and TalkTalk Telecom Group plc ("TalkTalk"), have a total of around 16.5million subscribers.[269] Over half of UK households pay for a television service,[270] with 36 per cent taking pay-TV as a standalone service and 64 per cent having pay-TV as a bundled service.[271]

[265] Stefaan Verhulst, 'The United Kingdom' in David Goldberg, Tony Prosser and Stefaan Verhulst, *Regulating the Changing Media: A Comparative Study* (Clarendon Press 1998) 106.

[266] On events leading up to the merger, see Mark Williams, 'Sky Wars: The OFT Review of Pay-TV' (1997) 18(4) *European Competition Law Review* 214.

[267] 'TR1 Notification of Major Interest in Shares' (British Sky Broadcasting Group PLC, 1 July 2013) <https://markets.ft.com/data/announce/full?dockey=1323-11632121-101T5VTRVSMISK2IMINF5RC9P0> accessed 18 August 2017.

[268] 'Virgin Media Q3 2016 Results' (Virgin Media press release, 4 November 2016) <http://www.virginmedia.com/corporate/media-centre/press-releases/virgin-media-q3-2016-results.html> accessed 25 April 2017.

[269] 'Review of the Pay TV Wholesale Must-Offer Obligation: Consultation Document' (Ofcom, 19 December 2014) 13 <https://www.ofcom.org.uk/__data/assets/pdf_file/0023/54185/Review-of-the-pay-TV-wholesale-must-offer-obligation.pdf> accessed 13 August 2017.

[270] ibid.

[271] 'Pricing Trends for Communications Services in the UK' (Ofcom, 15 March 2017) 28 <https://www.ofcom.org.uk/__data/assets/pdf_file/0028/98605/Pricing-report-2017.pdf> accessed 13 August 2017.

3.2.1.2 Delayed entry of BT into the UK cable television market

BT was prohibited from entering cable television until 2001,[272] to assist new entry by rival cable providers.[273] Since its entry into pay-TV in 2006 with the launch of the subscription IPTV service, BT TV (originally BT Vision), BT has expanded rapidly. It has utilised its incumbency in the UK telecommunications sector to attract 1.5million BT TV subscribers.[274] This represents 9 per cent of the total UK pay-TV market.[275] BT Sports channels are now in more than 5.2million homes.[276] BT requires BT TV customers to sign up to its broadband Internet and landline telephone services. This is significant given the continuing growth of Internet broadcasting and the popularity of online streaming. As part of BT Group plc,[277] BT is the UK's largest telecommunications service provider, with the largest share of the fixed UK broadband market at 32 per cent.[278]

BT's bundling capabilities were reinforced in August 2016 by its acquisition of the UK's largest mobile operator, EE Limited ("EE").[279] The acquisition is

[272] Secretary of State for Trade and Industry, *Competition and Choice: Telecommunications Policy for the 1990s* (White Paper, Cm 1461, 1991).
[273] Mark Armstrong, 'Competition in Telecommunications' (1997) 13(1) *Oxford Review of Economic Policy* 64, 69.
[274] BT Group plc's Annual Report 2016, 9 <http://www.btplc.com/Sharesandperformance/Annualreportandreview/pdf/2016-Annual-Report.pdf> accessed 13 August 2017.
[275] ibid 72.
[276] 'Financial Results for the Fourth Quarter and Year to 31 March 2015' (BT Group plc, 7 May 2015) 1 <https://www.rns-pdf.londonstockexchange.com/rns/4229M_-2015-5-6.pdf> accessed 13 August 2017.
[277] BT Group plc descends from the UK's first telecommunications undertaking, the Electric Telegraph Company, which was incorporated in 1846. Electric Telegraph Company's Act 1946.
[278] The remaining shares of the market are held by Virgin Media (19 per cent), TalkTalk (13 per cent), Sky (23 per cent), EE (4 per cent) and Others (8 per cent). 'Communications Market Report 2016' (Ofcom, 4 August 2016) 149 <https://www.ofcom.org.uk/__data/assets/pdf_file/0024/26826/cmr_uk_2016.pdf> accessed 13 August 2017.
[279] 'BT Group plc and EE Limited: A Report on the Anticipated Acquisition by BT Group plc of EE Limited' (CMA, 15 January 2016) <https://assets.publishing.service.gov.uk/media/56992242ed915d4747000026/BT_EE_final_report.pdf> accessed 13 August 2017; 'BT to retain EE brand as acquisition confirmed' (BT news release, 10 August 2016) <http://home.bt.com/news/bt-life/bt-to-retain-ee-brand-as-acquisition-confirmed-11364037422234> accessed 11 September 2016.

significant because EE services more than 31million connections across its mobile, fixed and wholesale networks.[280] This enables BT to deliver a fully-functional, quad-play service. Quad-play services are also offered by Talk Talk, which was launched in September 2012, via the BT network.[281] A further potential new entrant from the telecommunications sector was Vodafone Group plc ("Vodafone"), which has around 19million mobile customers in the UK.[282] Vodafone was expected to launch Internet-based Vodafone TV (which already exists in Ireland, Portugal and Spain) in the UK in 2016.[283] However, it is reported that Vodafone no longer intends to do so in the foreseeable future,[284] possibly due to its small share of the UK broadband market which it only entered in June 2015.[285]

3.2.1.3 Impact of new entry by online streaming services in the UK

New entry by SVOD platforms, Amazon Prime and Netflix in particular, means that online streaming in the UK has also grown significantly in recent years. Launched in 2007, Amazon Prime offers users unlimited access to a store of movies (and music and e-books) for an annual subscription fee of £79.[286] Since

[280] 'About EE' <http://ee.co.uk/our-company/about-ee> accessed 11 September 2016.

[281] TalkTalk is operated by TalkTalk Telecom Group plc. Originally launched in September 2000 as Homechoice by Video Networks Limited, in August 2006 Homechoice was purchased by Tiscali UK and became known as Tiscali TV. Following the acquisition by Carphone Warehouse in 2009 of Tiscali UK, Tiscali TV was rebranded as TalkTalk TV.

[282] 'Vodafone through the years' <http://www.vodafone.co.uk/about-us/company-history/> accessed 10 April 2015.

[283] Kate Palmer, 'Vodafone puts an extra £2bn into UK mobile after upgrade project falls behind schedule' *The Telegraph* (17 May 2016) <http://www.telegraph.co.uk/business/2016/05/17/vodafone-signals-modest-recovery-as-sales-rise-2pc/> accessed 13 August 2017.

[284] This is based on reports that Vodafone is seeking early exit from contracts with various channel providers. Christopher Williams, 'Vodafone wastes millions on thwarted pay-TV ambitions' *The Telegraph* (24 April 2017) <http://www.telegraph.co.uk/business/2017/04/24/vodafone-wastes-millions-thwarted-pay-tv-ambitions/> accessed 13 August 2017.

[285] Daniel Thomas, 'Vodafone launches broadband service into competitive UK market' *Financial Times* (10 June 2015) <https://www.ft.com/content/b7cf6960-0f4f-11e5-897e-00144feabdc0> accessed 2 September 2017.

[286] The annual cost of subscribing to Amazon was increased from £49 in 2014. Jeff Parsons, 'Amazon Prime: What is it and is it worth paying £79 a year for?' *The Mirror* (15 July 2015) <http://www.mirror.co.uk/news/technology-science/technology/amazon-prime-what-worth-paying-6070295> accessed 13 August 2017.

launching in the UK in 2012, Netflix has attracted more than 5million customers,[287] at a cost of £5.99 per month. This is notably less than the monthly cost of subscribing to Sky or Virgin Media, with basic packages for Sky (the Sky Original Bundle) and Virgin Media costing £20 and £18, respectively. BT offers a starter package of BT TV to its BT Broadband customers at no additional cost, and entertainment packages for between £10 and £16 per month.[288]

The price differentials between these services may be partly explained by differences between their content offerings. For example, Netflix does not stream live sport (although Amazon does). Meanwhile, Sky's 24-hour sports news television channel, Sky Sports News HQ, is included as part of the Sky Original Bundle. This is pertinent because despite the increasing consumption of sports coverage "on the move" in the form of highlights/updates, it will be seen how Ofcom remains reluctant to include sports news within the category of news and current affairs. Also, price is not necessarily the deciding factor for viewers (particularly sports fans) in choosing between pay-TV services. Additionally, as pay-TV providers rely more heavily on adopting a multi-media distribution strategy and integrating backwards into the production of content, the task of comparing the different price points of traditional pay-TV providers and new entrants becomes increasingly complex.

Despite such new entry, Sky remains the UK's largest pay-TV provider with 12.35million retail customers.[289] Access to premium content has played a vital role in enabling Sky to establish its strong market position in the analogue era. It retains the ability to bid aggressively for the broadcast rights to premium

[287] Jasper Jackson, 'Netflix races ahead of Amazon and Sky with 5m UK households' *The Guardian* (22 March 2016) <https://www.theguardian.com/media/2016/mar/22/netflix-amazon-sky-uk-subscribers-streaming> accessed 13 August 2017.
[288] 'BT TV & Broadband Packages' <https://www.productsandservices.bt.com/products/tv-packages/> accessed 22 July 2016.
[289] Sky plc's Group KPI Summary <http://s3-eu-west-1.amazonaws.com/skygroup-sky-static/documents/investors/results/2016/q4-kpi-summary.pdf> accessed 13 August 2017.

sport content. However, the consideration below of Sky's response to new entry, especially by BT, demonstrates increasingly strong dynamic competition.

3.2.2 Australian broadcasting with the changing nature of pay-TV

It is said to be no coincidence that the introduction of television in Australia coincided with the staging of the 1956 Olympic Games in Melbourne.[290] The initial broadcast was made by the ABC, Australia's first public service broadcaster, on 5 November 1956.[291] The Reithian tradition to "inform, educate and entertain" is evident in the ABC's public service mandate,[292] to provide programmes that:

> contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and […] programs of an educational nature.[293]

Similarly, the Special Broadcasting Service ("SBS") was established in 1975 as a national multicultural and multilingual broadcaster, to provide media services that inform, educate and entertain all Australians, and hence reflect Australia's multicultural society.[294]

In contrast to the BBC, the ABC lacked the benefits of monopoly or the licence fee funding model. It instead faced strong political opposition from the commercial FTA broadcasters with their associated press ownership.[295]

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[290] Stewart (n 154) 41.

[291] It is reported that the ABC Chairman at the time stated that television would be introduced largely because of the Olympic Games. Richard Boyer, 'This Television' *The ABC Weekly* (1 September 1956) 1.

[292] The Australian Broadcasting Commission was established under the Australian Broadcasting Commission Act 1932 and replaced by the Australian Broadcasting Corporation on 1 July 1983. Australian Broadcasting Corporation Act 1983, s 5(1).

[293] ibid s 6(1).

[294] Special Broadcasting Service Act 1991, s 6(1).

[295] Reith (n 120) 222.

Commercial FTA television in Australia commenced on 16 September 1956 with the launch of Channel Nine (or the Nine Network ("Nine")). Nine is owned by Nine Entertainment Co Holdings Ltd ("Nine Entertainment") (formerly Publishing and Broadcasting Limited ("PBL")). Later that year, Channel Seven (or the Seven Network ("Seven")) was launched. Seven is owned by Seven West Media Limited ("Seven West Media"). The third commercial FTA channel, Channel Ten (or Network Ten ("Ten")), which is owned by Ten Network Holdings Ltd, was launched on 1 August 1964. Unlike their UK counterparts, Seven, Nine and Ten do not have public service remits, but they are subject to programme quotas in the Australian Content Standard,[296] and a system of co-regulation.[297]

3.2.2.1 Moratorium on the introduction of pay-TV in Australia

Seven, Nine and Ten were instrumental in the delay to the introduction of pay-TV in Australia. Intense lobbying contributed to the imposition by the Federal Government of Australia, in 1986, of a 4-year moratorium (extended by an additional year in 1990),[298] on the supply of pay-TV to domestic receivers.[299] The aims of the moratorium included to protect commercial FTA

[296] For instance, the Australian Content Standard requires all commercial FTA television licensees to broadcast an annual minimum transmission quota of 55 per cent of Australian programming between 6am and midnight. Broadcasting Services Act 1992, s 122(1); Australian Content Standard (n 226).

[297] This is based on codes of practice developed by industry representative groups (Free TV Australia and the Australian Subscription Television and Radio Association) in consultation with ACMA and subject to periodical review by ACMA. Broadcasting Services Act 1992, s 123A.

[298] Other contributing factors concerned licence allocations (including a bidding process with low deposits which attracted many tenderers that failed to honour their bids on time), the desire of the Federal Government of Australia to obtain a successful outcome for the privatisation of Australia's national satellite service, and the apparent lack of consumer demand. 'Pay Television' (Parliament of the Commonwealth of Australia background paper no.22, 28 November 1994) 2 <https://www.aph.gov.au/binaries/library/pubs/bp/1994-95/95bp22.pdf> accessed 13 August 2017.

[299] See, 'Future Directions for Pay TV in Australia' (Department of Transport and Communications, 1989); 'To Pay or Not to Pay? Pay Television and Other New Broadcasting-Related Services' (House of Representatives Standing Committee on Transport, Communications and Infrastructure, 1989). The introduction in 1986 of Video and Audio Entertainment and Information Services meant pay-TV services could be delivered to non-domestic receivers such as hotels and clubs. Parliament of the Commonwealth of Australia (n 298) 1.

television against competition from pay-TV.[300] The perceived need for such protection was influenced by investments made by Seven, Nine and Ten under the policy of equalisation, which sought to provide residents of regional Australia with the same television services as residents of the capital cities.[301] Seven, Nine and Ten operate commercial television services in predominantly metropolitan markets. Some of their services are made available in regional areas under affiliation agreements with regional television licensees (including Prime Media Group Limited, Southern Cross Media Group Limited, WIN Corporation Pty Ltd and Imparja Television Pty Ltd).[302]

3.2.2.2 Introduction of pay-TV in Australia and the rise of Foxtel

In 1992, the Parliament of the Commonwealth of Australia enacted Part 7 of the BSA,[303] which provides the legislative basis for the introduction of pay-TV in Australia.[304] Key provisos to the introduction of pay-TV included an initial ban on advertising on pay-TV (which lasted until 1 July 1997),[305] and a requirement that subscription fees remained the predominant source of funding for pay-TV providers.[306] This was followed by restrictions on the content and scheduling of advertising on pay-TV which remain in the advertising code for subscription television in Australia.[307] Under the BSA, Australis Media Limited ("Australis") acquired a monopoly on satellite

[300] House of Representatives Standing Committee on Transport, Communications and Infrastructure (n 299) 20.
[301] ibid 3.
[302] 'ACMA Communications Report 2010-11', 56 <http://www.acma.gov.au/~/media/Research%20and%20Analysis/Publication/Comms%20Report%202010%2011/PDF/communications_report_201011%20pdf.pdf> accessed 13 August 2017.
[303] As amended by the Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992.
[304] This followed a recommendation in 1989 by the House of Representatives Standing Committee on Transport, Communications and Infrastructure that the Federal Government of Australia should announce an in-principle decision to introduce pay-TV in Australia. House of Representatives Standing Committee on Transport, Communications and Infrastructure (n 299) 23.
[305] Broadcasting Services Act 1992, s 101(1).
[306] ibid sch 2, pt 6, s 2(b).
[307] 'Codes of Practice 2013: Subscription Broadcast Television' (Australian Subscription Television and Radio Association, 2013) 12-13 <https://www.astra.org.au/images/pages/ASTRA_Subscription_Broadcast_Television_Codes_of_Practice_2013.pdf.pdf> accessed 13 August 2017.

broadcasting. In 1995, under a joint venture with Continental Century, it launched Australia's first pay-TV service, Galaxy. In 1998, Australis went into liquidation and the Galaxy service was taken over by Foxtel.

Foxtel was established in 1995 as a joint venture between the former Federal Government of Australia's telephony monopoly, Telstra Corporation Limited ("Telstra"), and News Corp (which was founded by Rupert Murdoch and is owned by the Murdoch Family Trust).[308] News Corp was formed in 2013, alongside Twenty-First Century Fox, as spin-offs of the former News Corporation (which was founded by Rupert Murdoch in 1979, as a holding company for his Australian newspaper business, News Ltd). Under the joint venture, Telstra is obliged to own and maintain the cable network over which Foxtel supplies its content to subscribers. The relationship between Foxtel and Telstra is unique and, as will be suggested, potentially significant for its enduring impact on the structure of the Australian pay-TV industry.

Foxtel has access to broadcast rights to Australia's two leading sporting codes, the AFL and the NRL. Under a 6-year broadcast rights agreement that will run from 2017 to 2022, together with Seven and Telstra, Foxtel retains the broadcast rights to the AFL.[309] At AU$2.508billion, such rights have doubled in value on the previous rights arrangement which expired at the end of 2016.[310] Fox Sports Australia also holds NRL rights under a contract with Nine

[308] News Corp focuses on newspapers and publishing, whilst Twenty-First Century Fox is comprised of the former News Corporation's broadcasting and media properties (including the Fox Entertainment Group).

[309] Travis King and Ben Guthrie, 'AFL signs new six-year, $2.5 billion broadcast rights deal' (AFL, 18 August 2015) <http://www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal> accessed 2 September 2017.

[310] Jared Lynch, 'Bidding for AFL television rights could reach $2b' *The Sydney Morning Herald* (3 March 2015) <http://www.smh.com.au/business/media-and-marketing/bidding-for-afl-television-rights-could-reach-2b-20150303-13tgjn.html> accessed 13 August 2017.

Entertainment and Telstra, which is said to be worth around AU$1.2billion over five years and expires at the end of 2017.[311]

3.2.2.3 Cable television in Australia and the National Broadband Network

The liberalisation of the Australian telecommunications sector under the Telecommunications Act 1991 saw the formation of a duopoly involving Telstra and SingTel Optus Pty Limited (then Optus Communications Pty Limited) ("Optus"). In 1991, Optus acquired the publicly-owned operator of Australia's national satellite service, Aussat Pty Limited, which was established in 1985 when the first communications satellite was launched in Australia. Originally the Australian Overseas Telecommunications Corporation Limited, Telstra was formed by the merger of Telecom Australia and the Overseas Telecommunications Commission.[312] The duopoly provided Optus and Telstra (now Australia's largest mobile operators),[313] with the exclusive right to construct and operate broadband cable networks in Australia.

Optus owns and operates its own network infrastructure, in addition to using the services of other network service providers, most notably Telstra

[311] Jared Lynch and John Stensholt, 'Seven to try for knockout bid for NRL and AFL rights' *Australian Financial Review* (3 May 2015) <http://webcache.googleusercontent.com/search?q=cache:S-96o9x84RwJ:www.afr.com/business/sport/seven-to-try-for-knockout-bid-for-nrl-and-afl-rights-20150430-1mx2dt+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 13 August 2017.

[312] The Overseas Telecommunications Commission was established in 1946 with responsibility for all international telecommunications services into, through and out of Australia.

[313] Telstra is Australia's largest mobile operator with around 16million customers. 'Telstra Half Year Results' (Telstra, 12 February 2015) <https://www.telstra.com.au/aboutus/investors/financial-information/financial-results> accessed 13 August 2017. Optus is Australia's second largest mobile operator with a 30 per cent share of the market and a mobile network which covers 98.5 per cent of the Australian population. 'SingTel Annual Report 2014', 8 and 17 <http://info.singtel.com/annualreport/2014/downloads/Singtel_AR2014.pdf> accessed 13 August 2017. Vodafone Hutchison Australia, which is 50 per cent owned by Hutchison Telecommunications Australia and 50 per cent owned by Vodafone Group plc, follows with around 5.3million customers. 'Vodafone financial results mark final year of turnaround: customer numbers grow in second half of year' (Vodafone media release, 18 February 2015) <http://webcache.googleusercontent.com/search?q=cache:traz5o-0x6cJ:www.vodafone.com.au/media/financial-results-final-year/+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 13 August 2017.

Wholesale (a Telstra business that sells access to Telstra's networks in the wholesale market). Telstra enjoys a further competitive advantage as Australia's incumbent telecommunications service provider from owning the fixed-line telephone network and as sole provider of 46 per cent of fixed-line services in regional Australia.[314] Telstra's market position was strengthened by the fact that its privatisation coincided with the rise of public Internet access in Australia. This had the effect of leveraging its dominance as a telephone call carrier into the supply of Internet content through its 50 per cent share in Foxtel.

In an attempt to introduce facilities-based competition, Telstra and Optus were encouraged to build/overbuild cable networks in the same area.[315] The roll-out of parallel networks of hybrid fibre coaxial cable led to the duplication of coverage across half of Australia, with the remaining half not receiving any coverage. In April 2009, NBN Co Limited was established as a government-owned entity to design, build and operate the National Broadband Network ("NBN") i.e. Australia's first national wholesale-only, open-access broadband network.[316] Once the migration of Telstra's fixed-line services to the NBN is complete, Telstra will cease to control the network (which is expected to provide minimum broadband download speeds to all premises and super-fast broadband to 90 per cent of premises).[317]

[314] 'Australia's Telecommunications Market Structure: The Price Premium Paid by Consumers' (The Centre for International Economics, prepared for Vodafone Hutchison Australia, June 2015) 1 <https://www.communications.gov.au/sites/g/files/net301/f/Vodafone%20-%20Attachment%20E.pdf> accessed 13 August 2017.

[315] Lesley Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart Publishing 2006) 214; 'Telecommunications Competition Regulation Report No 16' (Productivity Commission, 2001) 527.

[316] NBN Co Limited ACN 136 533 741, Companies Register, Australian Securities and Investment Commission.

[317] 'Statement of Expectations' (NBN Co Ltd, 24 August 2016) 1 <http://www.nbnco.com.au/content/dam/nbnco2/documents/soe-shareholder-minister-letter.pdf> accessed 13 August 2017.

3.2.2.4 Competitive responses to the growth of online streaming in Australia

Foxtel is now Australia's largest pay-TV provider with 2.88million subscribers.[318] Under the Telstra joint venture, Foxtel has access to Telstra's cable network for the retail supply of pay-TV services. This places Foxtel in an advantageous position as regards the possibilities for bundling its content and services. Through its digital STB (T-Box), Telstra supplies Foxtel ("Foxtel from Telstra") and BigPond Movies (which offers new movie releases from AU$6 each and television episodes from AU$2 each). Subscription costs for Foxtel start from AU$26 per month for its basic entertainment package.[319] In 2014, the cost of Foxtel was almost halved from AU$49 to AU$25 per month, in an attempt to increase Foxtel's penetration beyond 30 per cent.[320] This endeavour was made in the midst of intensified competition from SVOD.

Australia's first online streaming service, Quickflix Limited ("Quickflix"), in which Nine Entertainment was a major investor,[321] was launched in 2003. Stan, a joint venture between Nine Entertainment and Fairfax Media, was launched in January 2015. Stan offers a monthly subscription of AU$10 for unlimited viewing of selected movies and television shows. In April 2016, Quickflix announced its appointment of voluntary administrators.[322] Its founder and chief executive, Stephen Langsford, cites Quickflix's limited

[318] Harry Tucker, 'Foxtel is putting up a huge fight in the Netflix world' *Business Insider Australia* (18 February 2016) <https://www.businessinsider.com.au/foxtel-subscribers-are-up-8-despite-streaming-service-onslaught-2016-2> accessed 13 August 2017.

[319] 'Foxtel Entertainment Pack' <https://www.foxtel.com.au/get/tv-combos/entertainment.html> accessed 3 August 2016.

[320] Claire Reilly, 'Foxtel cuts prices, adds channels, announces IQ3' *CNet* (4 September 2014) <https://www.cnet.com/au/news/foxtel-cuts-prices-adds-channels-announces-iq3/> accessed 28 July 2017.

[321] Australian Associated Press, 'Nine snaps up HBO's stake in Quickflix' *The Australian* (21 July 2014) <http://www.theaustralian.com.au/business/companies/nine-snaps-up-hbos-stake-in-quickflix/news-story/9956ab52e68c73d676afacf3d0df25ef> accessed 13 August 2017.

[322] 'Quickflix Appoints Voluntary Administrator' (Quickflix ASX release, 26 April 2016) <https://images.quickflix.com.au/Site/Investor/ASX%20Announcements/QuickflixAppointsVoluntaryAdministrator.pdf> accessed 13 August 2017.

ability to raise capital due to redeemable preference shares as contributing to its inability to raise sufficient capital to continue investing in content.[323]

Foxtel's response to such new entry has included offering triple-play services. It sells fixed-line broadband and telephony services in competition with its 50 per cent owner Telstra. It has also launched online services, such as Foxtel Play and Presto (a 50:50 joint venture between Foxtel and Seven West Media, which starts at AU$10 per month for television or movies). Under proposed acquisitions between Foxtel and Ten, which the ACCC confirmed in October 2015 it will not oppose,[324] Ten will also have an option to acquire 10 per cent of Presto. The proposed acquisitions, which include for Foxtel to acquire up to 15 per cent of Ten and for Ten to acquire a 24.99 per cent stake in Foxtel's advertising agency Multi-Channel Network,[325] are discussed in Chapter 5 of the thesis. In 2014, the cost of Presto was (similar to the cost of Foxtel) halved to AU$10 per month, bringing it on par with the price points of most online streaming services.[326]

As will be seen, Foxtel has also responded by investing more heavily in premium drama, particularly since the launch of Netflix Australia Pty Ltd ("Netflix Australia") in March 2015. Starting at AU$8.99 per month, Netflix Australia had attracted 2.78million subscribers by the end of 2015.[327] This is significantly more than the 450,000 subscribers to Stan,[328] which was

[323] ibid.
[324] 'ACCC to not oppose Foxtel and Ten acquisitions' (ACCC media release no.MR 201/15, 22 October 2015) <https://www.accc.gov.au/media-release/accc-to-not-oppose-foxtel-and-ten-acquisitions> accessed 13 August 2017.
[325] ibid.
[326] Harry Tucker, 'How Foxtel plans to fight Netflix' *news.com.au* (23 March 2015) <http://www.news.com.au/technology/home-entertainment/tv/how-foxtel-plans-to-fight-netflix/news-story/c528c4aed4b4382c1f5521853456fa4d> accessed 28 July 2017.
[327] 'Netflix finishes 2015 reaching 2,728,000 Australians' (Roy Morgan Research, 19 January 2016) <http://www.roymorgan.com/findings/6633-netflix-growth-slows-by-end-of-year-december-2015-201601182300> accessed 14 March 2016.
[328] Chris Pash, 'These numbers show just how far local rival Stan is behind Netflix' *Business Insider Australia* (5 November 2015) <https://www.businessinsider.com.au/these-numbers-show-just-how-far-local-rival-stan-is-behind-netflix-2015-11> accessed 13 August 2017.

launched two months prior to the launch of Netflix Australia. The difference in subscriber figures here will be due, at least in part, to Netflix's established brand recognition (with tens of thousands of Australians using virtual private networks to access the US version of Netflix, prior to the launch of Netflix Australia),[329] and public hype surrounding the launch of Netflix Australia. Also, its global scale provides Netflix with deeper pockets for investing in the production and supply of content to attract subscribers. According to its first quarterly results for 2017, Netflix has 94.363million paid streaming memberships.[330] Increasing annual investment in original shows exceeds AU$1billion.[331] It is reported that Netflix Australia has some 5million subscriptions, with 92 per cent of such subscriptions being paid (compared to 258,960 paid subscriptions for Stan and 90,880 paid subscriptions for Presto).[332]

3.3 Market for Premium Sports Rights with the Emergence of Traditional Pay-TV

The advent of pay-TV in the UK and Australia saw the possible migration of the coverage of certain sporting events away from FTA television exclusively to pay-TV. Hence the introduction of anti-siphoning regulation. The focus here is on the market entry of traditional pay-TV providers, namely Sky in the UK and Foxtel in Australia. A pay-TV provider is likely to be able to outbid commercial FTA broadcasters for the rights to premium content because advertisers are unlikely to be willing to pay as much per viewer as viewers might themselves pay to watch the same programme on pay-TV.[333] Over time,

[329] Elle Hunt, 'Netflix to stop Australians accessing US content library using proxies and VPNs' *The Guardian* (15 January 2016) <https://www.theguardian.com/media/2016/jan/15/netflix-to-stop-australians-accessing-us-content-library-with-proxies-and-vpns> accessed 13 August 2017.
[330] Netflix Inc Q1 Quarterly Earnings 2017 <https://ir.netflix.com/results.cfm> accessed 19 April 2017.
[331] Mark Sweney, 'Netflix nudges 100m subscribers but what next for the streaming giant?' *The Guardian* (15 April 2017) <https://www.theguardian.com/media/2017/apr/15/netflix-nudges-100m-subscribers-but-what-next-for-the-streaming-giant> accessed 13 August 2017.
[332] 'Five million Australians now have Netflix; Stan and Presto are still well behind, but growing' (Roy Morgan finding press release no.6839, 15 June 2016) <http://www.roymorgan.com/findings/6839-netflix-stan-presto-subscription-video-on-demand-may-2016-201606141025> accessed 13 July 2016.
[333] Agnes M Siedlecki, 'Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?' (1978) 53(4) *Indiana Law Journal* 821, 823.

this reinforced the ability of Sky and Foxtel to acquire further rights, thereby entrenching their market positions in televised sport in the UK and Australia in the analogue era.

3.3.1 Impact of Sky on televised sport in the UK

The televised transmission of sport in the UK commenced on 9 April 1938 with a football match between England and Scotland.[334] Regular football coverage began in 1968 with BBC's *Match of the Day*.[335] Coverage of top-flight football was therefore available to viewers at no additional direct cost on the BBC. When Sky emerged in 1990, live sports coverage was integral to its business strategy.[336] It set out to acquire the exclusive rights for the live coverage of a range of sporting events. Its most notable acquisition arguably remains the live broadcast rights to the then newly formed Premier League for its first five seasons from 1993-1997. Recorded highlights were shown on the BBC in connection with the revival of *Match of the Day*. Sky agreed to pay £304million for the rights.[337] As will be seen, this is low by today's standards, but was significant for the time.

At that time, matches within the Football League (now the English Football League ("EFL")) generally involved only the top five teams of Division One (Arsenal, Liverpool, Everton, Manchester United and Tottenham Hotspur). The television revenue from these matches was distributed between all 92 league member clubs.[338] It was the dissatisfaction of the top clubs with this and voting arrangements more generally which provided the impetus for the top clubs to form a breakway league, in 1992, in the form of the Premier League.[339] The Premier League made an unprecedented decision to sell its

[334] Dobson and Goddard (n 175) 171.
[335] ibid.
[336] Szymanski (n 133) 269.
[337] Sky ultimately paid around £190million. Dobson and Goddard (n 175) 173.
[338] Ofcom (n 1) 74.
[339] Decisions were made on the basis of one vote per club. With 92 clubs in total and 22 clubs in Division One, it meant that the clubs in Division One were often outvoted. Other influential factors included

broadcast rights to a pay-TV provider (i.e. Sky), for a sum in the region of four times the price previously paid by the BBC.[340] This was something of a gamble given that Sky was operating at a loss, but it paid off for Sky.[341] Whilst its acquisition of the Premier League rights was not the only factor at play (given its focus also on premium movies, as discussed later), it is noteworthy that by 1995 the number of Sky subscribers increased from around 1million to 3million.[342]

Sky Sports was launched in 1991 and was rebranded as Sky Sports 1 when its second sports-dedicated channel Sky Sports 2 was launched in 1994. Sky has since used its ability to secure the exclusive broadcast rights to live sports events to dominate the retail supply of premium sport content on pay-TV in the UK. Its business model has undeniably been based on appealing to sports fans, particularly fans of football ("the people's game").[343] In 1996, Sky launched Sky Sports 3 and, in 1999, it introduced Sky Sports Extra, offering interactive sports coverage via its digital services.[344]

There is the suggestion that Sky may subsidise the cost of acquiring sports rights with revenue from its entertainment services. For example, in 2008/2009, sports programming represented 54 per cent of Sky's total programming costs and 21 per cent of its entire operating expenditure.[345] This was significantly more than the 16 per cent that Sky spent on movies, which

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that, at the time, English football clubs were over-trading to get the "best" players in the hope that it would pay-off in terms of revenue. The television deal in 1991 also came at a low point for English football following significant events in the 1980s, such as the Heysel stadium wall disaster, the Bradford City stadium fire and the Hillsborough disaster.

[340] This was preceded by negotiations between the top five teams of Division One of the EFL and then head of ITV Sport, Greg Dyke, regarding television rights to a then theoretical breakway league.

[341] Competition issues arising in relation to the joint selling of broadcast rights are considered in Chapter 6.

[342] Szymanski (n 133) 270.

[343] Stephen Morrow, *The People's Game? Football, Finance and Society* (Palgrave Macmillan 2003) 1.

[344] See, 'Sport on Television' (Independent Television Commission, June 2003).

[345] Ofcom (n 1) 74.

represented 6 per cent of its entire operating expenditure.[346] This is despite the fact that its entertainment audience was larger than its sports audience.[347] Multi-sided platform considerations may apply here as, whilst Sky's sports audience may be smaller, the demographic of this audience (typically comprised predominantly of young male viewers) means that it could attract more than its entertainment audience by way of advertising revenue. This is significant because advertising represents the second highest revenue stream for Sky, after viewer subscription fees.[348]

In the analogue era, Sky faced relatively little competition for sports rights. In 1998, two franchises of the ITV network, Carlton Communications and Granada plc (now ITV Digital Channels Ltd, a wholly-owned subsidiary of ITV plc), launched the pay-TV service ONdigital plc, which was rebranded as ITV Digital in 2001.[349] ITV Digital offered premium sport content (including coverage of the EFL) on its ITV Sport channel. In 1998, ITV Digital predicted that it would cost £350million to break even.[350] However, by July 2001 it had already cost £800million and ITV Digital confirmed that it did not expect to turn a profit before 2003.[351] Low audience ratings and an ultimately unaffordable multi-million-pound deal with the EFL led ITV Digital to suffer massive losses and, in March 2002, it was forced to enter into administration. Setanta is another prime example of a pay-TV provider that has unsuccessfully sought to challenge Sky's position in televising live football in the UK.[352]

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[346] ibid.
[347] ibid.
[348] Advertising provided 6.5 per cent of Sky's revenue for 2016, representing £778million out of a total revenue of £11,965million. Jeremy Darroch, 'Full Year Results 2016' (Sky plc, 2016) 14 <http://s3-eu-west-1.amazonaws.com/skygroup-sky-static/documents/investors/results/q4_presentation.pdf> accessed 13 August 2017.
[349] 'Ondigital relaunches as ITV Digital' *BBC News* (11 July 2001) <http://news.bbc.co.uk/1/hi/entertainment/1433671.stm> accessed 13 August 2017.
[350] ibid.
[351] ibid.
[352] See, James Robinson, 'Setanta thought it had a sporting chance. It lost' *The Guardian* (28 June 2009) <https://www.theguardian.com/business/2009/jun/28/sentant-bskyb-football> accessed 13 August 2017.

More recently, regulatory efforts have been made to improve the prospects for competition in the live coverage of the Premier League by increasing the availability of its broadcast rights. Scrutiny of the Premier League's selling arrangements at the EU level brought an end in 2006 to Sky's monopoly in the live coverage of its matches.[353] This followed a Statement of Objections issued by the European Commission in 2002 concerning the compatibility of the horizontal joint selling arrangements of the Premier League with Article 101(1) of TFEU (which it concluded did not fulfil the criteria for exemption under Article 101(3)).[354] The negotiation of commitments ultimately required that the broadcast rights for the fifth auction, relating to seasons 2008-2010, were split into six packages.[355] Also, no single broadcaster was permitted to acquire all six packages.[356]

The UK arm of the Irish pay-TV provider, Setanta, acquired two of the packages, with Sky acquiring the other four. However, as a result of inadequate viewer subscriptions, Setanta defaulted on its payment to the Premier League.[357] In June 2009, it entered into administration and its Premier League rights were acquired by the Disney-owned US cable provider, ESPN.[358] It followed that, as a consequence of Sky remaining the dominant bidder for the live rights to the Premier League, for the first twenty years of the Premier League none of its matches were broadcast live on FTA television in the UK.[359] This was also made possible by the fact that the Premier League is not subject to anti-siphoning regulation in the UK.

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[353] *Joint selling of the media rights to the FA Premier League* (Case COMP/C-2/38.173) OJ C(2006)868.
[354] 'Commission opens proceedings into joint selling of media rights to the English Premier League' (European Commission press release IP/02/1951, 20 December 2002) <http://europa.eu/rapid/press-release_IP-02-1951_en.htm?locale=en> accessed 13 August 2017.
[355] *FA Premier League* (n 353) [33, 37, 41].
[356] ibid annex, para 3.2.
[357] Dobson and Goddard (n 175) 173.
[358] ibid.
[359] A similar fate became of the EFL with Sky dominating the live television rights to EFL matches between 1996 and 2010, at which point Sky entered into a partnership with the BBC. This partnership

3.3.2 Influence of Foxtel on the television coverage of sport in Australia

Australia has similarly seen the migration of some sports coverage to pay-TV and to a single pay-TV provider in particular. Like Sky in the UK, Foxtel in Australia has focused on using premium sport to develop its pay-TV service. Akin to Sky's involvement in the formation of the Premier League, the creation of Super League in 1995 was an attempt by News Corp to secure access to the broadcast rights to top-level professional rugby league football (which was then represented by the Australian Rugby League ("ARL")). Broadcast rights to the ARL were vested in Nine and Optus. News Corp contracted ARL players and clubs to compete in its Super League. After prolonged litigation regarding the arrangements under which the players/clubs defected to Super League,[360] and one season of Super League, the ARL and Super League merged to form the NRL.

The migration of sports coverage to pay-TV is not solely a consequence of the strategy of Foxtel and News Corp to use sport to attract subscribers. It is also influenced by the commercial climate in which Australian FTA broadcasters operate. This includes the limited amount of airtime that remains after the dedication of airtime to the mainstream sports of rugby league, cricket and Australian Rules Football.[361] It is reported that neither Seven, Nine nor Ten were sufficiently interested to compete for soccer.[362] These circumstances led to soccer at all levels, excluding the World Cup finals (which are covered by the Australian "anti-siphoning" rules),[363] becoming available exclusively on

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meant that, for the first time since 1996, the EFL was broadcast live on FTA television in the UK. ibid 174-175.

[360] *News Ltd v Australian Rugby Football League Ltd and Others No.1* (1996) 135 ALR 33; *No.2* (1996) 139 ALR 193; (1996) 58 FCR 447; (1996) 64 FCR 410.

[361] Callum Gilmour and David Rowe, 'Getting a Ticket to the World Party: Televising Soccer in Australia' in Christopher J Hallinan and John E Hughson, *The Containment of Soccer in Australia: Fencing Off the World Game* (Routledge 2013) 20.

[362] Les Murray, 'Football's new TV realities' *SBS* (15 April 2007) <http://theworldgame.sbs.com.au/blog/2007/04/15/football-s-new-tv-realities> accessed 30 June 2016.

[363] Broadcasting Services (Events) Notice (No.1) 2010, sch para 8.

pay-TV. It is arguable that Foxtel's sports strategy may ultimately have benefitted fans by providing them with the opportunity to access television coverage which might not otherwise have been available at all.

Like Sky, Foxtel faced relatively little competition for sports rights in the analogue era. With the demise of Australis in 1998, Foxtel acquired Australis' network of 50,000 satellite dishes and decoders in former Galaxy subscribers' homes.[364] It also secured access to part of the Galaxy package which included a range of sport and movie content. Australis had output deals with Sony, Paramount and Universal,[365] and Optus had output deals with Disney, Warner Bros and Metro-Goldwyn-Mayer.[366] However, the competition between Australis and Optus for the exclusive rights to premium movies led to high minimum subscriber guarantees, high costs and financial difficulties which contributed to the eventual demise of Australis.[367]

3.4 Competition for Sports Rights from Telecommunications Service Providers

For telecommunications service providers, the acquisition of sports rights represents a potentially vital part of bundling services and becoming a multi-media firm.[368] The likes of BT in the UK and Optus in Australia have sought in this way to capitalise on their established customer base in the telecommunications sector to develop their own pay-TV services. Pay-TV subscribers may not have, as yet, seen a significant (if any) reduction in subscription fees as a consequence of this. However, when the dynamic aspect of competition is taken into consideration, the net effect on consumer welfare is likely to be positive.

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[364] Anne Davies, 'Foxtel pulls off coup in battle for pay TV' *The Sydney Morning Herald* (6 March 1998) <http://newsstore.fairfax.com.au/apps/viewDocument.ac?docID=news980603_0686_6609> accessed 13 August 2017.
[365] Cento Veljanovski, *Pay TV in Australia: Markets and Mergers* (Institute of Public Affairs 1999) 22.
[366] ibid.
[367] ibid.
[368] Tom Evens, Petros Iosifidis and Paul Smith, 'The Next Big Match: Convergence, Competition and Sports Media Rights' (2016) 31(5) *European Journal of Communication* 536.

3.4.1 Impact of BT's entry on live sports broadcasting in the UK

The launch of BT Sport in 2010 laid the foundations for an unprecedented shift in the competitive dynamic for the wholesale acquisition of sports rights in the UK. It was followed by the acquisition by BT in 2013 of all UK television rights to exclusively broadcast live UEFA Champions League and Europa League matches for 2015-2018. BT paid £897million for the rights.[369] This is more than double the total price that was previously paid by Sky and ITV.[370] BT has since retained the exclusive rights to show European football in the UK until the summer of 2021, after seeing off competition from Sky with a deal worth £1.18billion (nearly £300million more than it paid for the rights in 2013).[371] In acquiring the rights to UEFA Champions League and Europa League matches, BT became the first UK broadcaster to hold exclusive live television rights to all matches from both major leagues.[372] In February 2015, it also won two of the seven packages of matches for the live television rights to the Premier League for 2016-2019 (with Sky Sports winning the other five).[373]

As the UK's largest telecommunications service provider (particularly since its recent acquisition of EE), BT's business model is based on using its telecommunications customer base to bundle content and services. Despite the policy of local loop unbundling (which requires BT to allow its rivals to provide high-speed services over the last mile of the local copper loop),[374] BT benefits from a competitive advantage in the lead that it maintains over cable

[369] 'Champions League: BT Sport wins £897m football rights deal' *BBC Sport* (9 November 2013) <http://www.bbc.co.uk/sport/football/24879138> accessed 13 August 2017.
[370] ibid.
[371] Sam Dean, 'BT Sport sees off Sky with £1.2bn deal for Champions League football rights' *The Telegraph* (6 March 2017) <http://www.telegraph.co.uk/business/2017/03/06/bt-sees-sky-12bn-deal-champions-league-football-rights/> accessed 13 August 2017.
[372] BT Group (n 274) 6.
[373] See, 'Commission makes commitments from FA Premier League legally binding' (European Commission press release IP/06/356, 22 March 2006) <http://europa.eu/rapid/press-release_IP-06-356_en.htm?locale=en> accessed 13 August 2017. This decision is considered in Chapter 6.
[374] Communications Act 2003, ss 45, 87 and 88 (UK); Regulation 2887/2000 of the European Parliament and the Council of 18 December 2000 on unbundled access to the local loop [2000] OJ L336/4 (EU).

operators in the local loop. BT Sport channels are free to BT TV customers.[375] BT Broadband customers get BT Sport for free, together with £5 off their mobile bundle and access to the BT Sport App.[376] Similar offers have been extended to EE pay-monthly customers who benefit from 6-months' free access to the BT Sport Pack via the BT Sport App.[377]

The apparent impact of BT's acquisition of key sports rights on its economic performance supports the discussion in the previous chapter on the economic value of premium sport content to pay-TV providers. Following its acquisition of broadcast rights to the Premier League, BT's share price rose by 2.8 per cent to 456.2p, which represented a 14-year high.[378] According to BT's financial results for the year to 31 March 2015,[379] BT Sport channels are in more than 5.2million homes and, in the fourth quarter of 2014, it attracted 52,000 new customers.[380] BT reports that it now has 1.7million television customers across BT TV, YouView TV on Plusnet and EE TV.[381] This represents a 9 per cent market share of the UK pay-TV retail market.[382]

The corresponding share price and subscriber figures for Sky suggest that it has not been significantly adversely affected by BT's entry into the UK sports

[375] 'BT Sport' <https://www.productsandservices.bt.com/products/bt-sport> accessed 28 July 2016.
[376] 'BT Broadband households can now get fantastic deals on mobile phone plans' <http://home.bt.com/tech-gadgets/phones-tablets/bt-launches-pay-monthly-mobile-phone-deals-11364067826611> accessed 28 July 2016.
[377] 'BT Sport App now free for EE customers' <http://sport.bt.com/football/bt-sport-app-now-free-for-ee-customers-S11364075032059> accessed 28 July 2016.
[378] Nick Goodway, 'Premier League TV rights: BT shares rise following deal, while Sky's fall' *The Independent* (11 February 2015) <http://www.independent.co.uk/news/business/news/premier-league-tv-rights-bt-shares-rise-following-deal-while-skys-fall-10039086.html> accessed 13 August 2017.
[379] 'Results for the Fourth Quarter and Year to 31 March 2015' (BT Group plc press release, 7 May 2015) <http://www.prnewswire.com/news-releases/bt-group-plc-results-for-the-fourth-quarter-and-year-to-31-march-2015-300079499.html> accessed 13 August 2017.
[380] ibid.
[381] BT Group plc Annual Report 2017, 60 <http://www.btplc.com/Sharesandperformance/Annualreportandreview/2017summary/downloads/Annual-Report-and-Form-20-F-2017.pdf> accessed 2 September 2017.
[382] ibid 56.

rights market. In its results for the six months ended 31 December 2014,[383] Sky reports "significant outperformance" in the UK and Ireland, with 204,000 new customers representing its highest growth in nine years.[384] Sky does not appear to distinguish between pay-TV customers and users of its Internet-based NowTV service, which was launched in 2012 to rival the likes of Netflix. The cost to viewers of subscribing to NowTV is relatively low at £9.99 per month for the Sky Movies Pass (although the Sky Sports Month Pass costs significantly more at £33.99 per month).

Cord-cutting is generally not considered to be an industry-wide concern in the UK.[385] However, Sky could begin to experience difficulty if pay-TV subscribers "cut the cord" and switch to online streaming. Sky's chief financial officer has reportedly acknowledged that the growth of NowTV is "slightly dilutive" to Sky's average revenue per user ("ARPU").[386] Although Sky has experienced a steady increase in its ARPU from £45 in 2012 to £47 in 2016.[387] This suggests that the market is for now capable of sustaining at least two major players.

The increase in competition for sports rights has not reduced the cost to viewers of subscribing to Sky or BT. There has, in fact, been a slight increase in subscription fees, influenced by the increase in competition for acquiring such rights. The £5.1billion which Sky and BT agreed to pay in the 2015 auction for the live television rights to the Premier League was up from

[383] 'Unaudited Results for the Six Months Ended 31 December 2014' (Sky plc press release, 3 February 2015) <http://s3-eu-west-1.amazonaws.com/skygroup-sky-static/documents/investors/results/2015/q2-results-press-release.pdf> accessed 13 August 2017.
[384] ibid 1.
[385] Neil Midgley, 'Sky v. Netflix: Surprising new proof that, in the U.K., cord-cutting is just not a thing' *Forbes* (21 April 2016) <http://webcache.googleusercontent.com/sites/undefined/undefined/undefined/undefined/undefined/?q=cache:l62zGH9yVTwJ:www.forbes.com%2Fsites%2Fneilmidgley%2F2016%2F04%2F21%2Fsky-v-netflix-surprising-proof-that-in-the-u-k-cord-cutting-is-just-not-a-thing%2F%20&cd=1&hl=en&ct=clnk&gl=uk&client=safari#205cb9102834> accessed 13 August 2017.
[386] Mark Sweney, 'Sky adds 127,000 customers in UK in third quarter' *The Guardian* (21 April 2015) <https://www.theguardian.com/media/2015/apr/21/sky-adds-127000-customers-in-uk-in-third-quarter> accessed 13 August 2017.
[387] Sky (n 289).

£3billion in 2012.[388] Sky has since increased the subscription fees for its sports and family bundles to £47 and £36 per month, respectively.[389] This represents an increase in cost to the individual subscriber of £1 a month for Sky's sports bundle and £3 a month for its family bundle.[390] Whilst this price increase to the individual subscriber may seem nominal, with Sky supplying 8.8million UK households,[391] it represents a significant additional source of revenue for Sky to continue to bid aggressively for premium sport content.

In 2014, BT imposed a 6.49 per cent increase in the cost of home phone and broadband packages for all of its customers, in what has been described by some industry observers as a "football tax".[392] The potentially adverse price effects for viewers are arguably more considerable if the sports (or even just football) broadcasting market is considered as a whole. For instance, following BT's acquisition of rights to the Premier League, in order to watch all live Premier League matches, viewers may need to bear the cost of subscribing to both BT and Sky.

The non-price effects of the increased competition between Sky and BT appear to be stronger with more intense dynamic competition. This includes the launch of new services, such as BT Sport Ultra HD and BT Sport's connected red button service, which enables BT TV viewers to switch between matches and to use a new "goal alert" function to keep track of the

[388] 'Premier League in Record £5.14bn TV Rights Deal' *BBC News* (10 February 2015) <http://www.bbc.co.uk/news/business-31379128> accessed 13 August 2017.
[389] Ben Rumsby, 'Sky announce price hike – despite saying fans would not foot bill to watch football after new £4bn contract' *The Telegraph* (19 March 2015) <http://www.telegraph.co.uk/sport/football/competitions/premier-league/11482477/Sky-announce-price-hike-despite-saying-fans-would-not-not-foot-bill-to-watch-football-after-new-4bn-contract.html> accessed 13 August 2017.
[390] ibid.
[391] 'TV Landscape Report: UK Households by TV Platform' (Broadcasters' Audience Research Board, 30 May 2017) <http://www.barb.co.uk/tv-landscape-reports/uk-households-by-tv-platform-interactive/> accessed 2 September 2017.
[392] Miles Brignall, 'BT to put prices up for home phone and broadband customers by 6.49%' *The Guardian* (23 August 2014) <https://www.theguardian.com/business/2014/aug/23/bt-price-increase-6pc-home-phone-broadband-football> accessed 13 August 2017.

action across a range of matches. Also, the BT Sport App provides customers with additional functionality like goal replays and alternative camera angles, with the aim of enhancing the viewer experience. From a consumer welfare perspective, increasingly strong dynamic competition between Sky and BT has the potential to offset concerns regarding the upward price effects of the increase in competition for live sports rights.

Sky has also sought to strengthen its market position by merger. In November 2014, Sky Europe was created by the merger of British Sky Broadcasting Group Plc, Sky Deutschland AG and Sky Italia. As Europe's largest pay-TV provider with 20million customers across the UK, Ireland, Germany, Italy and Austria,[393] the merger could have a significant impact on the competitive dynamic in the UK sports rights market.[394] The reported objectives of the merger for Sky expressly include to compete more aggressively against BT and US-based SVOD platforms like Netflix.[395]

3.4.2 Entry of Optus into live sports broadcasting in Australia

Similar to the experience with BT in the UK (but distinguished by Optus' some 15-year lead on BT in the supply of pay-TV services), telecommunications services provider Optus has recently made its foray into sports broadcasting in Australia. In October 2015, Optus announced a sponsorship deal as Cricket Australia's streaming partner.[396] The Cricket Australia Live Pass gives Optus users the ability to watch matches for AU$29.99 per season. As a

[393] De Menezes (n 200).
[394] 'BSkyB Completes £7bn German and Italian Deal' *Sky News* (13 November 2014) <http://news.sky.com/story/bskyb-completes-7bn-german-and-italian-deal-10382714> accessed 13 August 2017.
[395] Kristen Schweizer, 'Murdoch's Europe Pay-TV Empire unites with Diabolik Crime' *Bloomberg Business* (6 November 2014) <https://www.bloomberg.com/amp/news/articles/2014-11-06/murdoch-s-europe-pay-tv-empire-unites-with-diabolik-crime> accessed 13 August 2017.
[396] David Ramli, 'Optus pads up with Cricket Australia to stream games' *The Sydney Morning Herald* (23 October 2015) <http://www.smh.com.au/business/media-and-marketing/singteloptus-signs-deal-with-cricket-australia-to-stream-premium-content-20151021-gkfcxh.html> accessed 13 August 2017.

consequence of Optus being able to bundle its services, data used on mobile devices in watching matches does not count against users' download allowances. In May 2016, Optus displaced Foxtel as holder of the Australian television rights to the Premier League, for which Optus will pay AU$200million over three years.[397] This exceeds the amount paid for the rights to both Super Rugby and the A-League, despite the fact that the Premier League attracts relatively fewer viewers in Australia.[398] Whilst attracting fewer viewers, the Premier League is valuable because it takes place during the Australian summer when the NRL and AFL are not in play, and it is not subject to anti-siphoning regulation in Australia.

The willingness of Optus to pay such a high price for these rights suggests that, as with BT in the UK, it intends to capitalise on its telecommunications customer base. This is supported by Optus' pricing strategy which is aimed at increasing the ARPU for each of its customers across all of its communications businesses.[399] For instance, Optus is releasing a mini-STB at a cost of AU$5 per month for its mobile customers who want to watch matches on television.[400] Optus reports a mobile ARPU of AU$41 per month.[401] Although this is less than half of Foxtel's ARPU of AU$89 per month.[402]

In 2016, Optus offered live coverage of the 2016/2017 season of the Premier League to customers who subscribed to mobile plans from AU$30 per month

[397] Harry Tucker, 'How Optus stole the English Premier League from Foxtel' *Business Insider Australia* (5 May 2016) <https://www.businessinsider.com.au/how-optus-stole-the-english-premier-league-from-foxtel-2016-5> accessed 13 August 2017.
[398] It is reported that, in 2015, 1.7million Australians watched the Premier League and around 2.1million Australians watched the A-League. ibid.
[399] ibid.
[400] ibid.
[401] Historical financial summaries of the Singtel Group's results for the last quarter ended March 2016 <http://info.singtel.com/about-us/investor-relations/financial-results?dispatcher=302> accessed 28 July 2016.
[402] News Corp's Annual Report for the year ended 30 June 2016, 13 <http://investors.newscorp.com/secfiling.cfm?filingID=1193125-16-679975&CIK=1564708> accessed 17 August 2017.

(with such coverage costing subscribers AU$15 per month from 31 July 2017).[403] Premier League coverage is also offered at no additional cost to subscribers of plans valued at AU$85 per month or more.[404] This may incentivise customers looking at mobile and broadband plans around the AU$70 per month price bracket to opt for the more expensive contract. It may also encourage customers to sign up for Optus' Yes TV by Fetch service, included in broadband plans above AU$90 per month.[405]

Rather than respond by reducing its subscription fees, Foxtel has increased the price of its basic package from AU$25 to AU$26 per month.[406] As with the increase in subscription fees for Sky's sport and movie packages, for individual Foxtel subscribers this may not represent a significant increase. However, with 2.88million subscribers, it will provide Foxtel with invaluable additional revenue for reinvesting in content. Indications of this are already apparent from Foxtel's expansion of its sports offering with the addition of new sport channels through beIN Sports, which includes coverage of major football events such as the UEFA Champions League and matches by the "Big Five" European football leagues.[407] Since July 2016, the official club television channels for Chelsea, Liverpool and Manchester United have also formed part of the Foxtel sports package.[408] Whilst it is too early to draw firm conclusions, the suggestion is that (like Sky in the UK) Foxtel is responding to new entry

[403] 'The new Premier League season is yours for free' <https://www.optus.com.au/epl> accessed 28 July 2016.
[404] 'Optus customers to get English Premier League from $15 per month on selected plans' (Optus media release, 4 May 2016) <https://media.optus.com.au/media-releases/2016/optus-customers-to-get-english-premier-league-from-15-per-month-on-selected-plans/> accessed 28 July 2016.
[405] ibid.
[406] Dominic White, 'Foxtel price rise sparks backlash but boosts profit' *The Sydney Morning Herald* (15 March 2016) <http://www.smh.com.au/business/media-and-marketing/foxtel-price-rise-sparks-backlash-but-boosts-profit-20160314-gnihjk.html> accessed 13 August 2017.
[407] beIN Sports is a subsidiary of beIN Media Group, which is owned by the Al Jazeera network. In 2014, it acquired pay-TV sports channel Setanta Sports Australia (subsequently rebranded as beIN Sports Australia). 'beIN SPORTS Asia Pacific' <https://beinmediagroup.com/subsidiary/bein-sports-asia-pacific/> accessed 28 July 2016.
[408] Paul Farrell, 'Football Heaven: Foxtel adds SIX new sport channels' (Foxtel, 6 May 2016) <https://www.foxtel.com.au/got/whats-on/foxtel-insider/foxtel/sport/football.html> accessed 16 May 2016.

into the sports rights market by focusing on differentiating its content through the launch of new and innovative content and services.

3.5 Rise of Premium Drama with the Growth of Online Streaming

The growth of online streaming is changing the competitive dynamic for the retail supply of premium non-sport content, particularly premium drama, in both the UK and Australia. Traditional pay-TV providers are responding to new entry by SVOD platforms by investing more heavily in the production and exclusive supply of original drama. On the face of it, the UK has arguably experienced greater change in this respect, with a higher level of new entry, compared to the smaller Australian market. However, consideration of the relative impact of new entry from a socio-economic perspective,[409] based on the inherent link between the market and society,[410] suggests that the effects on consumer welfare in the UK and Australia are comparable.

3.5.1 Impact of online streaming on the rise of premium drama in the UK

In addition to acquiring key sports rights, Sky's business model has been based on securing exclusive deals under output agreements with the Major Hollywood Studios. These deals come up for renewal in 2017 and 2018. It is possible that BT will compete against Sky for these deals, as it did with the rights to the Premier League and the UEFA Champions League. In its response to Ofcom's proposal in 2010 to make a reference to the CMA regarding premium movies on UK pay-TV,[411] BT identifies premium movies and drama (in addition to sport) as the most effective drivers of pay-TV subscriptions.[412]

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[409] The expression "socio-economic" is used here to refer to the study of economic activity in the light of social processes. For discussion on the various meanings of socio-economic, see Simon Hellmich, 'What is Socioeconomics? An Overview of Theories, Methods, and Themes in the Field' (2017) 46(1) *Forum for Social Economics* 3-25.

[410] See, Paul Stern, 'The Socio-Economic Perspective and its Institutional Prospects' (1993) 22(1) *The Journal of Socio-Economics* 1, 2-3.

[411] 'BT's Response to Ofcom's Proposed Reference to the Competition Commission in respect of Premium Pay TV Movies' (BT, 14 May 2010) <https://www.ofcom.org.uk/__data/assets/pdf_file/0019/42427/bt.pdf> accessed 13 August 2017.

[412] ibid 5.

Without access to such content, the ability of a pay-TV provider to compete is said to be severely limited.[413] It remains to be seen, however, what impact the recent launch of direct subscription services by Disney and NBCUniversal may have on any output deal renewals.

The pricing structure of most SVOD platforms means that they are effectively priced out of competing for the broadcast rights to premium sports events and, to a lesser extent, premium movies. Based on an estimated total number of SVOD subscribers of 6.3million,[414] with an average subscription cost of £10 per month, the annual revenue generated from SVOD in the UK will be around £756million. This is less than what BT paid in the most recent auction for live television rights to the UEFA Champions League alone.[415] However, as already noted, the economics of online streaming is more compatible with the supply of premium drama. The potential impact of new entry on the competitive dynamic for the retail supply of premium drama in the UK is already evident from trends in subscriber figures and investment in the production of premium drama.

According to the Broadcasters' Audience Research Board, the number of UK households that subscribe to any SVOD service increased from around 4million in the first quarter of 2014 to around 6.5million at the fourth quarter of 2015.[416] 8.89million UK households now subscribe for VOD.[417] Sky and BT are also investing more than ever in drama and in-house drama production.

[413] ibid.
[414] This is based on reports by Ofcom that, as of the first quarter of 2015, over 4.3million UK households pay for a Netflix subscription, less than 1.5million UK households subscribe to Amazon and around 500,000 UK households subscribe to NowTV. Ofcom (n 152) 54.
[415] 'Champions League: BT Sport wins £897m football rights deal' *BBC Sport* (9 November 2013) <http://www.bbc.co.uk/sport/football/24879138> accessed 13 August 2017.
[416] 'The UK Television Landscape Report: Is Netflix taking over?' (Broadcasters' Audience Research Board, 21 March 2016) <http://www.barb.co.uk/tv-landscape-reports/netflix-taking-over/> accessed 16 May 2016.
[417] 'The UK Television Landscape Report: SVOD Households' (Broadcasters' Audience Research Board, 25 May 2017) <http://www.barb.co.uk/tv-landscape-reports/svod-households-interactive-chart/> accessed 2 September 2017.

Sky has over 150 hours of original drama in production.[418] In April 2017, Sky announced a partnership with HBO for the US$250million co-production of high-end drama.[419] It was also recently reported that Sky will boost its drama budget by a quarter in 2017 in an effort to keep pace with spending by Netflix and Amazon, and to capitalise on the strong international appetite for drama box sets.[420]

3.5.2 Supply of premium drama and online streaming services in Australia

The trend of pay-TV providers using premium non-sport content to differentiate their services is also evident in Australia from increasing investment in the production and supply of original drama. Premium drama is an especially promising area of growth for Foxtel since its ability to secure the broadcast rights to premium movies is limited by output deals between the commercial FTA broadcasters and some of the Major Hollywood Studios. Seven has output deals with Sony Pictures and NBCUniversal, although these deals were scaled down in 2013.[421] Nine has an output deal with Warner Bros but is reportedly considering scaling down the deal.[422] Ten had an output deal with US commercial broadcast television network CBS, but this ended in 2014 amidst poor ratings.[423] In addition, as a condition of the ACCC's approval of

[418] 'Unaudited results for the three months ended 30 September 2015' (Sky plc, 30 September 2015) 4 <http://s3-eu-west-1.amazonaws.com/skygroup-sky-static/documents/media-center/news-releases/2015/unaudited-results-for-the-three-months-ended-30-september-2015.pdf> accessed 13 August 2017.
[419] 'HBO and Sky join forces to launch a new global drama powerhouse' (Sky plc news release, 20 April 2017) <https://www.skymedia.co.uk/news/hbo-sky-join-forces-launch-new-global-drama-powerhouse/> accessed 13 August 2017.
[420] Christopher Williams, 'Sky ramps up drama spending as profits take a hit from Premier League rights' *The Telegraph* (27 July 2017) <http://www.telegraph.co.uk/business/2017/07/27/sky-ramps-drama-spending-profits-take-hit-premier-league-rights/> accessed 13 August 2017.
[421] 'Ten Network cuts major content supply deal with CBS' *The Australian Financial Review* (23 September 2014) <http://webcache.googleusercontent.com/search?q=cache:-Nvl2b6_Bn4J:www.afr.com/business/media-and-marketing/tv/ten-network-cuts-major-content-supply-deal-with-cbs-20140922-jftom+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 13 August 2017.
[422] ibid.
[423] ibid.

Foxtel's merger with Austar in 2012 (which is considered in Chapter 6),[424] Foxtel undertook for a period of 8 years to not exclusively own VOD or IPTV rights to movies and television shows for a range of channels.[425]

Movie output deals do not, however, typically include SVOD rights, so the SVOD market in Australia is said to still be "up for grabs".[426] SVOD is growing rapidly in Australia. Between January and March 2015, Australia saw the launch of Stan, Presto and Netflix (each of which notably provide local content).[427] The take-up of SVOD has since increased rapidly. A survey carried out by ACMA in 2015 reported that around 17 per cent of the Australian population consumed content via SVOD in the six months to June 2015 (three months of which preceded the launch of Netflix Australia).[428] One year on, there followed reports that for the first time more Australians have SVOD than linear pay-TV.[429] This is potentially significant from an advertising revenue perspective amidst reports that the amount of advertising revenue remaining for local traditional media companies is diminishing and, by 2020, global online players will dominate advertising revenue in Australia.[430]

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[424] 'ACCC not to oppose AUSTAR acquisition after undertaking resolves concerns' (ACCC media release, 10 April 2012) <https://www.accc.gov.au/media-release/accc-not-to-oppose-austar-acquisition-after-undertaking-resolves-concerns> accessed 13 August 2017.

[425] Undertaking to the Australian Competition and Consumer Commission, given under Section 87B of the Competition and Consumer Act 2010 by FOXTEL Management Pty Limited for and on behalf of the FOXTEL Partnership, dated 9 April 2012, cls 3, 4.1 and 5-7.

[426] 'Equity Research on Nine Entertainment' (Credit Suisse, 4 April 2014) 4-5 <https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=ulg&format=PDF&document_id=1031543581&serialid=QQK9vapE9HTHvEymaeV45K6HNrzD9MR%2BBxj4PcZBEBA%3D> accessed 13 May 2015.

[427] Paul Kalina, 'Netflix, Stan and Presto support local content, to a point' *The Sydney Morning Herald* (4 June 2015) <https://www.smh.com.au/entertainment/tv-and-radio/netflix-stan-and-presto-support-local-content-to-a-point-20150602-ghdvfj.html> accessed 16 November 2015.

[428] 'Subscription video on demand in Australia 2015' (ACMA, 16 November 2015) <http://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Subscription-video-on-demand?utm_source=s0cial&utm_medium=blog&utm_campaign=svod> accessed 1 July 2016.

[429] 'More Australians now have SVOD than Foxtel' (Roy Morgan Research press release, 8 September 2016) <http://www.roymorgan.com/findings/6957-svod-overtakes-foxtel-pay-tv-in-australia-august-2016-201609081005> accessed 17 March 2017.

[430] Stephen Letts, 'Global internet giants crushing Australian media' *ABC News* (29 January 2016) <http://www.abc.net.au/news/2016-01-29/global-internet-giants-crushing-australian-media/7125458> accessed 13 August 2017.

In addition to supplying exclusive US content from HBO, Foxtel is focusing on enhancing its own investment in original drama. This includes a pledge to invest more heavily in the commissioning and production of Australian content.[431] As suggested in Chapter 2, local content is resonating well with home audiences, despite the increasing availability of content from around the World. For example, seven of the top ten shows that were aired on Foxtel in 2016 were homegrown productions.[432]

Similarly, Australia's three largest mobile operators (Telstra, Optus and Vodafone) can be seen as competing more aggressively in terms of providing more innovative content and services, and bundling the same to encourage mobile customers to subscribe also for pay-TV. For example, since May 2015, customers who have signed up for Telstra's mobile plans have received the option of a 12-month NRL Digital Pass, an AFL Live Pass or six months of Presto.[433] In 2015, Optus offered new subscribers a free 6-month subscription to Netflix.[434] Meanwhile, Vodafone Australia offers a range of content options from Stan and Spotify.[435]

[431] Shannon Molloy, 'Foxtel pledges to double its investment in original Australian TV content in three years' *news.com.au* (17 June 2015) <http://www.news.com.au/entertainment/tv/foxtel-pledges-to-double-its-investment-in-original-australian-tv-content-in-three-years/news-story/5ab6cbc77888bdb1c840e7f48b28d20b> accessed 29 July 2017.

[432] Darren Davidson, 'Local drama a major driver of Foxtel's ratings growth in 2016' *The Australian Business Review* (12 December 2016) <http://webcache.googleusercontent.com/search?q=cache:ewF5exKL5u4J:www.theaustralian.com.au/business/media/local-drama-a-major-driver-of-foxtels-ratings-growth-in-2016/news-story/89a0ea7006fc197353dda226d28aa51f+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 13 August 2017.

[433] David Ramli, 'Telstra offering free live NRL and AFL streaming to entice mobile customers' *The Sydney Morning Herald* (11 May 2015) <http://www.smh.com.au/business/media-and-marketing/telstra-offering-free-live-nrl-and-afl-streaming-to-entice-mobile-customers-20150509-ggy2vu.html> accessed 13 August 2017.

[434] This offer ended on 31 January 2016. 'Netflix Bonus Subscription Offer' <http://www.optus.com.au/shop/support/answer/netflix-bonus-subscription-offer?requestType=NormalRequest&id=5241&typeId=5> accessed 28 July 2016.

[435] Ramli (n 433).

In the light of new entry by SVOD platforms with business models based on the exclusive release of original dramas, the question arises (equally within the UK context) as to what constitutes "premium content". The likes of Netflix could be perceived as providing a largely new service which means that, in addition to expanding their own market shares, they are also expanding the overall size of the industry. The increasing number of homes that subscribe to some form of pay-TV suggests so, as does the continued success of Foxtel following the launch of Netflix Australia, for example. It is reported that, in the first half of 2016, the total number of Foxtel subscribers rose 8.1 per cent from 2.6million to approaching 2.9million. Subscribers through Telstra were up 17.9 per cent, with Telstra alone signing up 100,000 more customers.[436] This is claimed to be a direct result of increasing investment in quality content.[437]

3.6 Conclusions

The competitive dynamic in the supply of premium pay-TV in the UK and Australia is changing with new entry by established telecommunications service providers and online streaming services. Increasing competition for sports rights from established telecommunications service providers has been met with price increases for pay-TV customers. Albeit nominal for the individual customer, such price increases have not been limited to sports channel subscribers. This reinforces questions about who should bear the cost of the escalating wholeprice price of sports rights.

The scope for competition on price is greater in the context of premium movies and particularly drama. This is due to the different economics of producing such content and the lower price points of SVOD platforms (whose

[436] Harry Tucker, 'Foxtel is putting up a huge fight in the Netflix world' *Business Insider Australia* (18 February 2016) <https://www.businessinsider.com.au/foxtel-subscribers-are-up-8-despite-streaming-service-onslaught-2016-2> accessed 13 August 2017.
[437] ibid.

business models are focused on the exclusive supply of original drama). The potential impact of this is particularly significant given that a high percentage of the UK and Australian populations (91.6 per cent and 84.6 per cent, respectively) now use the Internet.[438] This is despite the fact that relatively slow Internet connection speeds are considered to remain a countervailing factor in the growth of online streaming in Australia.[439]

The increasing economic value of original drama series as a form of premium content is evident in both the UK and Australia. Established pay-TV providers in both countries have responded to new entry by the likes of Netflix by investing more heavily in the production and supply of premium drama. The incentives for pay-TV providers to invest in premium drama (including local drama) is supported by the increasing opportunities to monetise such drama in the global market. This includes the use of local or national content by domestic pay-TV providers to differentiate their services from the services of SVOD platforms marketing to an international audience. This is exemplified by the enduring high global demand for British drama, which continues to experience year-on-year growth (despite economic and political uncertainty, particularly in Europe).[440] Australian dramas are also proving to be increasingly popular with international audiences.[441]

Despite these trends, the specific economic characteristics of the UK and Australian pay-TV industries continue to limit, to some extent, the scope for

[438] World Bank Data, 'Internet users (per 100 people)' <http://data.worldbank.org/indicator/IT.NET.USER.P2> accessed 16 July 2016.
[439] Samantha Donovan, 'Internet speeds: Australia ranks 44th, study cites direction of NBN as part of problem' *ABC News* (12 January 2015) <http://www.abc.net.au/news/2015-01-12/australian-internet-speeds-rank-44th-in-the-world/6012570> accessed 13 August 2017.
[440] Leo Barraclough, 'British Television Exports Rise 10% to $1.66 Billion' *Variety* (2 February 2017) <http://variety.com/2017/tv/global/british-television-exports-rise-ten-per-cent-1201976483/> accessed 10 August 2017.
[441] Steve Clark, 'U.S., U.K. Are World's Top TV Exporters, Australia Shows Improvement' *Variety* (24 February 2016) <http://variety.com/2016/tv/global/u-s-u-k-tv-exporters-australia-1201713741/> accessed 10 August 2017.

consumers to benefit from new entry, particularly in relation to live sports broadcasting. The ability of online streaming services to bid for sports rights is inherently restricted by their lower retail price points. By contrast, even nominal increases in subscription fees can provide traditional pay-TV providers (and established telecommunications service providers, on account of their established customer base), with significant additional revenue for reinvesting in content. This is likely to continue to hinder any further shift in the competitive dynamic in the sports rights market. Nevertheless, as the remainder of the thesis explores, the trends identified in this chapter (particularly in relation to premium drama) have regulatory implications for the assessment of market power in premium pay-TV in the digital era. This begins with how the relevant market is defined.

CHAPTER 4

ASSESSMENT OF THE MARKET AND MARKET POWER IN PREMIUM PAY-TV

4.1 Introduction

Market definition fulfils a fundamental role in assessing market power under UK/EU and Australian competition law. There are fundamental similarities between the approaches to market definition in these jurisdictions (as set out in the CMA's Market Definition Guidelines,[442] the European Commission's Notice on Market Definition,[443] and the ACCC's Merger Guidelines and Media Merger Guidelines).[444] Defining the relevant market assists in identifying in a systematic way the competitive constraints that firms face.[445] The relevant market is determined according to the possibilities for demand-side and supply-side substitution between products in a particular geographic area. It may also be defined by reference to a particular stage in the supply chain and/or a specific period of time.

The general conceptual approach to market definition applies to pay-TV like any other sector. However, the rapid rate of technological change in the digital era complicates the assessment of substitution possibilities. Methodological issues specifically arise in relation to determining whether prevailing prices are above the competitive level, asymmetric pricing by pay-TV providers as multi-sided platforms, and the bundling of pay-TV with other communications services. These issues can also obscure the functional and temporal dimensions of the relevant market which, in such a dynamic,

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[442] 'Market Definition: Understanding Competition Law' (CMA, December 2004) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf> accessed 13 August 2017.

[443] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5.

[444] 'Merger Guidelines' (ACCC, November 2008) <https://www.accc.gov.au/system/files/Merger%20guidelines.pdf> accessed 13 August 2017; ACCC Media Merger Guidelines (n 91).

[445] European Commission Notice on Market Definition (n 443) para 2.

vertically-integrated industry as pay-TV, are arguably more pertinent than is generally otherwise deemed to be the case.

Such issues do not arise exclusively in the premium pay-TV context. Whilst the standard conceptual approach to market definition remains fundamentally appropriate, this chapter identifies a number of respects in which it is likely to lead to markets being unduly narrowly defined. This will increase the risk of over-estimating market power, and unnecessary and potentially counter-productive regulatory interventions in the market. In the light of this, the chapter proposes an approach that places more emphasis on the increasingly global nature of the multi-media landscape.

4.2 Concept of Relevant Market under UK/EU and Australian Competition Law

Defining the relevant market is integral in applying the main provisions of UK/EU and Australian competition law. In assessing whether there has been an abuse of dominance for the purposes of the Chapter II prohibition or Article 102 of the TFEU, it is necessary to establish the existence of a dominant position in a given market. This presupposes that such a market has been defined.[446] Similarly, in applying the prohibition on the misuse of market power in Section 46 of the CCA, it is necessary to delineate the relevant market in order to find a substantial degree of power in that market.[447] For the purpose of applying the prohibition on anti-competitive agreements in Article 101 of the TFEU, defining the relevant market is used to determine whether an agreement has the object or effect of preventing, restricting or distorting competition in the Internal market, and is liable to affect trade between Member States.[448] Objection to the definition of the relevant market

[446] Case T-61/99 *Adriatica di Navigazione SpA v Commission* [2003] ECR II-5349 [27].
[447] *Australian Competition and Consumer Commission v Boral Besser Masonry Ltd* [2001] FCA 30 [300]; *ACCC v Baxter Healthcare Pty Ltd* [2005] FCA 581 [549].
[448] Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and Others v Commission of the European Communities* [2006] ECR II-5169 [172]; Case T-111/08 *MasterCard and Others v Commission*, 24 May 2012 [171].

is of no consequence provided the European Commission correctly concludes that the agreement satisfies such criteria.[449]

Market concentration is similarly assessed in relation to a specific market for the purposes of merger analysis.[450] In the UK, the substantive test is whether a relevant merger situation has resulted or may be expected to result in a substantial lessening of competition within any market(s) for goods/services in the UK.[451] This includes any market that operates in the UK and another country, or only a part of the UK.[452] As already noted, a concentration with a Community dimension is subject to the substantive test in the EU Merger Regulation as to whether the concentration would significantly impede effective competition in the Internal market (or a substantial part of the Internal market).[453]

In Australia, the test is whether an acquisition has the effect or likely effect of substantially lessening competition in any market.[454] In the merger context, "market" is defined as a market for goods/services in Australia or a state, territory or region of Australia.[455] The term "market" is defined in Section 4E of the CCA as "a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."[456] Consistent with the approach in the EU and the legislative purpose of the CCA,[457] the question as to whether a market is

[449] ibid.
[450] Joined Cases C- 68/94 and C-30/95 *France and Others v Commission* [1988] ECR I-1375 [143].
[451] Enterprise Act 2002, s 22(1)(b).
[452] ibid s 22(6).
[453] See n 92.
[454] Competition and Consumer Act 2010, s 50(1).
[455] ibid s 50(6).
[456] See, Robert Baxt, 'The Australian Concept of Market – How It Came to Be' in Megan Richardson and Philip L Williams, *The Law and the Market* (Federation Press 1995) 10-32.
[457] The legislative purpose of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Competition and Consumer Act 2010, s 2.

in Australia is not confined to geographic location, but whether the conduct affects Australian consumers and suppliers.[458]

Market definition is therefore not an end in itself, but rather a means to the end of assessing the competitive effects of the exercise of market power. Market power is typically defined in terms of the ability of a firm in the relevant market to profitably price above the competitive level for a sustained period of time. As Brunt observes, "[t]he elaborateness of the exercise should be tailored to the conduct at issue and the statutory terms governing the breach (or authorisation)."[459] This means that the relevant market cannot properly be defined in the abstract. It is defined in a manner which enables the impugned conduct to be assessed within the specific context of the process of competition in the individual case.[460]

4.3 Product Market Definition in the Premium Pay-TV Context

Definition of the relevant product market typically begins with consideration of the characteristics and intended use of the product(s) in question.[461] However, substitution possibilities also depend on how consumers value differences between such characteristics.[462] The standard quantitative method for determining this is the "hypothetical monopolist" or SSNIP test. This considers the response of consumers and suppliers to a small but significant and non-transitory increase in price ("SSNIP") by a hypothetical monopolist. First proposed in the US,[463] the SSNIP test has been adopted in

[458] *ACCC v Air New Zealand Limited* [2014] FCA 1157.
[459] Maureen Brunt, 'Market Definition Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 *Australian Business Law Review* 86, 126-127, cited in *Arnotts Limited & Ors v Trade Practices Commission* (1990) 24 FCR 313 [48].
[460] *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826; (2006) ATPR 42,123 [429].
[461] European Commission Notice on Market Definition (n 443) para 36.
[462] ibid.
[463] The SSNIP test was first proposed in the 1982 Merger Guidelines of the US Department of Justice and is now set out in the US Horizontal Merger Guidelines. 'Horizontal Merger Guidelines' (US Department of Justice and the Federal Trade Commission, 19 August 2010) para 4.1.1.

the UK/EU and Australia.[464] The adoption of a quantitative approach under the SSNIP test represents a positive development on the more subjective approach that previously existed in the UK/EU and Australia.[465] However, seeking to apply the SSNIP test in the premium pay-TV context highlights the limitations of adopting a purely quantitative approach.

4.3.1 Standard principles for defining the relevant product market

The relevant product market is said to encompass all those products/services which are regarded as interchangeable or substitutable by consumers and suppliers, by reason of the products' characteristics, prices and intended use.[466] The process of defining the relevant product market begins with identifying the products supplied by the firm(s) in question. Economic substitutes for such products are then identified. The objective is to include within the relevant product market only those substitutes whose prices and/or other characteristics constrain the ability of the firm(s) and their rivals from increasing price and/or reducing output or other competitive effort. This is assessed from the demand-side and the supply-side.

4.3.1.1 Product market definition and demand-side substitutability

The assessment of demand-side substitutability involves determining the range of products that are considered by consumers to be substitutable.[467] Demand-side substitution is described as "the most immediate and effective

[464] CMA Market Definition Guidelines (n 442) paras 2.5-2.13 (UK); European Commission Notice on Market Definition (n 443) para 17 (EU). ACCC Merger Guidelines (n 444) paras 4.19-4.22; *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 [1034] (AU).

[465] Reference is made here to the subjective considerations relating to the "special features" of bananas (i.e. the appearance, taste, softness, seedlessness, easy handling and constant level of production of bananas), which led the European Commission in *United Brands* to find a separate banana market. *United Brands* (n 32) [31]. In a similar vein, in *Top Performance Motors*, the Australian Industrial Court (now the Industrial Division of the Federal Court of Australia) notoriously relied on a dictionary definition of "market" as "trade or traffic, especially as regards a particular commodity", to narrowly define the relevant market as the market for the Datsun motor car. *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286; 5 ALR 465, *per* Joske J.

[466] European Commission Notice on Market Definition (n 443) para 7.

[467] ibid para 15.

disciplinary force" on suppliers because a firm cannot have a significant impact on the prevailing conditions of supply if consumers can easily switch to other products and/or suppliers.[468] It is unnecessary for products to be perfect substitutes (i.e. identical in terms of price, quality and otherwise), or for substitution to be instantaneous or complete.[469] It is sufficient for consumers to consider the products in question to be close substitutes.[470] As the HCA established in *Queensland Wire*,[471] a market can exist if there is the potential for close competition, even if none in fact exists.[472]

In identifying close substitutes, the SSNIP test addresses the question as to whether consumers would switch to readily available substitutes or suppliers located elsewhere, in response to a SSNIP in the products and areas in issue. This typically refers to an increase in price of 5 to 10 per cent,[473] for a period of at least one year.[474] Such an increase in price is regarded in the UK as indicative of a SSNIP.[475] In Australia, a SSNIP usually consists of a price rise for the foreseeable future of at least 5 per cent above that which would prevail in the absence of the conduct in question.[476] The candidate market constitutes the relevant market if a hypothetical, profit-maximising monopolist could profitably increase price accordingly. If a sufficient number of consumers would switch so as to render the price increase unprofitable, the SSNIP test is applied to a wider candidate market that encompasses such products. This process is repeated to find the narrowest set of products within

[468] ibid para 13.
[469] ACCC Merger Guidelines (n 444) para 4.16.
[470] ibid.
[471] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6; (1989) 167 CLR 177.
[472] ibid [196].
[473] US Horizontal Merger Guidelines (n 463) 9.
[474] 'Market Definition' (OECD policy roundtable DAF/COMP(2012)19, 11 October 2012) 30 <http://www.oecd.org/daf/competition/Marketdefinition2012.pdf> accessed 13 August 2017.
[475] CMA Market Definition Guidelines (n 442) 5; European Commission Notice on Market Definition (n 443) para 17.
[476] ACCC Merger Guidelines (n 444) para 4.21.

which a hypothetical monopolist could profitably sustain prices above the competitive level.

With regards to the period of time over which substitution possibilities are assessed, in *Tooth & Tooheys*,[477] the ACT endorsed the approach adopted in *QCMA*,[478] that substitution possibilities should be assessed in the "longer run".[479] This refers to "operational time" rather than calendar time.[480] It depends on the commercial realities of the industry in question but does not include supplies arising from entirely new entry.[481]

> This does not mean we seek to prophesy the shape of the future - to speculate […] Rather we ask of the evidence what (would be) likely to happen to patterns of consumption and production were existing suppliers to raise price or, more generally, offer a poorer deal. For the market is the field of actual or potential rivalry between firms.[482]

In the UK, the CMA notes that the relevant time period may be significantly shorter than one year.[483] This will depend, for instance, on how long consumers take to respond to an increase in price and the frequency with which consumers purchase the relevant product.[484] So in the communications context, the relevant period of time may be longer in respect of technology in which consumers typically invest every several years, but shorter for content consumed more regularly.

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[477] *In re Tooth & Co Limited; In re Tooheys Limited* (1979) ATPR 40-113.
[478] *QCMA* (n 34).
[479] ibid [17,247]; *Tooth & Tooheys* (n 477) [18,196].
[480] *Telecom Corporation of NZ Ltd v Commerce Commission* (1991) 3 NZBLC P99-239 [102, 363]; *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR 41-593 [44,210]; *Seven Network Ltd v News Limited* [2007] FCA 1062 [1772].
[481] ibid.
[482] *Tooth & Tooheys* (n 477) [18,196]; ACCC Merger Guidelines (n 444) para 4.8.
[483] CMA Market Definition Guidelines (n 442) para 3.6.
[484] ibid.

Two key factors that have a bearing on demand (and supply) responses to a SSNIP are the base price from which the hypothetical price increase is applied and the amount of the increase in price. These factors are treated similarly in the UK/EU and Australia by reference to the prevailing market price.[485] In relation to abuse of dominance cases, however, it is recognised that the prevailing price may already have been substantially increased.[486] This refers to the fact that a firm in a position of market power may have raised prices above the competitive level to the profit-maximising level.[487]

The risk of using a price that is above the competitive level was illustrated in the US *Du Pont* case.[488] Du Pont produced almost 75 per cent of the cellophane sold in the US. The US Supreme Court concluded that Du Pont did not have significant market power because at prevailing prices there were available substitutes for cellophane. The relevant market was defined as the market for flexible packaging materials. Cellophane accounted for less than 20 per cent of all flexible packaging material sold in the US. It was consequently found that competition from other materials in that market prevented Du Pont from possessing monopoly power in the sale of cellophane.[489]

This decision has been criticised on the basis that prevailing prices were above the competitive level (as a result of the exercise of market power) and, at lower competitive prices, there may not have been substitutes for cellophane.[490] In which case, it is likely that Du Pont would have been found

[485] European Commission Notice on Market Definition (n 443) para 19; ACCC Merger Guidelines (n 444) para 4.19.
[486] European Commission Notice on Market Definition (n 443) para 19.
[487] CMA Market Definition Guidelines (n 442) para 5.5.
[488] *United States v EI Du Pont de Nemours & Co* 351 US 377 (1956).
[489] ibid 351.
[490] See, Gene C Schaerr, 'The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers' (1985) 94(3) *Yale Law Journal* 670; Luke M Froeb and Gregory J Werden, 'The Reverse *Cellophane* Fallacy in Market Delineation' (1992) 7(2) *Review of Industrial Organisation* 241.

to possess market power. Where the base price used in defining the relevant market is above the competitive level, the market may be defined unduly broadly. Market power may then not be identified, giving rise to the so-called "cellophane fallacy".[491] This is acknowledged in the CMA's Market Definition Guidelines which note the possibility that market conditions may have been distorted by the presence of market power will be accounted for when all of the evidence is weighed in the round.[492]

The European Commission acknowledges that determining whether the prevailing price exceeds the competitive level is one of the most difficult aspects of the SSNIP test.[493] Within the context of the EU regulatory framework for electronic communications,[494] it suggests that national regulatory authorities may rely on other criteria for assessing demand and supply substitution, such as functionality of services and technical characteristics. Where there is evidence to show that a firm has engaged in anti-competitive behaviour, such as price-fixing, or has enjoyed market power, this may indicate that its prices are above the competitive level.[495]

The SSNIP test is therefore regarded as just one tool or "intellectual aid to focus the exercise", as part of an equally qualitative approach to market definition.[496] The question is whether, if a firm were to "give less and charge more", there would be much of a reaction.[497] To this end, a change in what is offered may be as significant as a change in price.[498] Hence, in both Australia

[491] ibid.
[492] CMA Market Definition Guidelines (n 442) para 5.6.
[493] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services OJ C(2002)165/6, para 31.
[494] ibid.
[495] ibid.
[496] *Seven Network Limited v News Limited* [2007] FCA 1062 [1786]; ACCC Merger Guidelines (n 444) para 4.22.
[497] *QCMA* (n 34) [17,248].
[498] *Seven Network Limited v News Limited* [2009] FCAFC 166 [669].

and the UK/EU, a range of quantitative and qualitative criteria are taken into consideration when assessing the possibilities for demand-side (and supply-side) substitution.[499] Qualitative criteria also extend beyond physical properties, end use and industry perceptions, to include factors such as switching costs for consumers and suppliers.[500]

4.3.1.2 Supply-side substitutability in defining the relevant product market

Supply-side substitutability refers to whether (and, if so, to what extent and how quickly) firms may supply the product/service in issue in response to an attempt by a hypothetical monopolist to sustain prices above the competitive level. For substitutes to impose an effective competitive constraint, suppliers must be able to switch production to the product/service in issue without any significant impediment (such as substantial investment or significant delay). The CMA regards supply-side substitution as entry that occurs quickly (i.e. in less than one year), effectively (i.e. on a large enough scale to affect prices) and without the need for substantial sunk costs.[501] Similarly, the ACCC will consider supply-side substitutes where switching can take place quickly and without significant investment in response to a SSNIP.[502]

Supply-side substitution is addressed sequentially after demand-side substitution in the ACCC's Merger Guidelines.[503] This reflects the statement in *Tooth & Tooheys* that, when defining the product and geographic dimensions of the relevant market, supply-side substitutes are to be taken into consideration.[504] Similarly, in *Queensland Wire*,[505] the HCA stated that both demand-side and supply-side substitutability shall be taken into account

[499] See, CMA Market Definition Guidelines (n 442) paras 3.7 and 3.16; ACCC Merger Guidelines (n 444) para 4.27.
[500] CMA Market Definition Guidelines (n 442) 8-9; ACCC Merger Guidelines (n 444) para 4.22.
[501] CMA Market Definition Guidelines (n 442) para 3.15.
[502] European Commission Notice on Market Definition (n 443) para 4.24.
[503] ACCC Merger Guidelines (n 444) para 4.23.
[504] *Tooth & Tooheys* (n 477) [18,196].
[505] *Queensland Wire* (n 471).

in defining the relevant market.[506] Supply-side substitution fulfils a seemingly less prominent role in the UK,[507] where it is regarded as "a special case of entry".[508] It is taken into account only if it is reasonably likely to take place and already constrains the supplier of the product/service in question.[509] In the event of serious doubt as to whether to account for supply-side substitution, the market is defined on the basis of demand-side substitutability,[510] with the supply-side considered at the stage of analysing potential entry.[511]

4.3.2 Role of product-based distinctions in defining premium pay-TV markets

Media outlets have traditionally been differentiated according to the mode of distribution. Separate markets have been defined for print media, radio, FTA television and pay-TV. In the analogue era, traditional pay-TV and FTA television were distinguished by reference to differences between the nature of their respective trading relationships and funding models. Such characteristics were relied on by the European Commission in the *MSG Media Service* case.[512] Admittedly, this case was decided prior to the digital switchover and growth of the Internet as a broadcasting platform. However, it remains important to note how the differences on which such characteristics are based are diminishing. This highlights the decreasing significance of product-based distinctions in defining markets in the premium pay-TV context.

[506] ibid 199.
[507] See, Dr Atilano J Padilla, 'The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control' (Report for European Commission DG Enterprise A/4, June 2001).
[508] CMA Market Definition Guidelines (n 442) para 3.15.
[509] ibid para 3.18.
[510] ibid.
[511] ibid.
[512] *MSG Media Service* (Case IV/M.469) OJ L(1994)364/1.

4.3.2.1 Trading relationships and funding models in assessing substitutability

The direct trading relationship between content providers and subscribers influenced the European Commission's finding in *MSG Media Service* that pay-TV constitutes a product market distinct from commercial advertising-funded television, and public television financed by fees and advertising.[513] Whilst with advertising-funded television the trading relationship is between the broadcaster and advertiser, the trading relationship in pay-TV is between the content provider and subscriber.[514] The conditions of competition that result from these different trading relationships were found to be significant:

> Whereas in the case of advertising-financed television the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors are the shaping of programmes to meet the interests of the target groups and the level of subscriber prices.[515]

The ACCC has similarly distinguished between FTA television and pay-TV on this basis.[516] It notes how the resulting differences in funding models have demand-side implications, since "viewers must be persuaded that pay TV is a unique product and one which cannot be substituted by FTA broadcasts."[517] The resulting conditions of competition from the different trading relationships of pay-TV and FTA television also influenced the OFT's findings in its 1996 review of Sky's position in the wholesale UK pay-TV market.[518] It found that, whilst FTA channels competed with Sky for certain sports rights, FTA television was unlikely to provide sustained and effective competition to

[513] ibid [32]; *Bertelsmann/Kirch/Premiere* (Case No IV/M.993) OJ C(1998)1439 [18]; *Kirch/Richemont/Telepiu* (Case No IV/M.410) OJ L(1994)2985 [15].
[514] ibid.
[515] ibid.
[516] ACCC (n 1) 77.
[517] ibid 78.
[518] 'The Director General's Review of BSkyB's Position in the Wholesale Pay TV Market' (OFT, December 1996). "The fact that subscribers are prepared to pay considerable sums for pay-TV, clearly indicates that pay-TV is a different product with a clear target." *Newscorp/Telepiù* (n 139) [42].

pay-TV in relation to sports broadcasting.[519] The ability of pay-TV providers to charge subscription fees was perceived to render many events "potentially far more valuable" to Sky than to FTA broadcasters.[520]

As seen in the previous chapter, the competitive responses of FTA broadcasters and pay-TV providers to the opportunities and challenges presented by digitalisation and convergence blur the analogue-era distinctions between their respective trading relationships and funding models. This includes the diversification of a number of FTA broadcasters (including ITV in the UK and Seven in Australia) into digital subscription television. Advertising also arguably represents a potentially more significant source of revenue for pay-TV than has generally deemed to be the case. This is based, for instance, on SVOD platforms like Hulu offering subscription-free versions of their services with advertising.

Responses by traditional pay-TV providers to the possible diversion of advertising spend to online services include increasing collaborations, such as Sky's recent advertising partnership with Virgin Media.[521] This will see the extension of Sky's AdSmart platform to the Virgin Media network.[522] It is expected to increase Sky's reach from 11.4million to 15million UK homes, and enable Sky and Virgin Media to reach a total of 30million individuals.[523] This should put them on a par with social media platforms like Facebook.

[519] OFT (n 518) para 2.5.
[520] ibid.
[521] David Bond, 'Sky links with up rival Virgin Media to fight Facebook and Google' *Financial Times* (15 June 2017) <https://www.ft.com/content/df55ff5a-5113-11e7-bfb8-997009366969> accessed 13 August 2017.
[522] ibid. With the launch of AdSmart in 2014, Sky became the first UK broadcaster to show different commercials to different households simultaneously. It allows advertisers to choose target audiences based on factors such as age, gender and geographical location, similar to targeted advertising sold online.
[523] ibid.

The blurring of the distinction between pay-TV and FTA television was envisioned by the European Commission in *MSG Media Service*. For instance, it referred to the potential financing of pay-TV from a mixture of sources.[524] It did not, however, consider the possible implications for the standard conceptual framework under the SSNIP test. Mixed source financing presents fundamental challenges in applying the SSNIP test in terms of ascertaining the appropriate price and where products/services are offered to users "free of charge". The competitive or prevailing price will be difficult to determine. The SSNIP test cannot be applied to products/services that are offered to users for "free". It will therefore be of limited application where there is no direct price as such. As will be discussed, this includes where services are bundled and where pay-TV providers as multi-sided platforms engage in asymmetric pricing.

4.3.2.2 Impact of asymmetric pricing by pay-TV providers as multi-sided platforms

Reliance on the nature of the trading relationship between broadcasters and viewers assumes the existence of a trading relationship. This relies on supply and demand being met by a specific price. Due to bundling by pay-TV providers as multi-sided platforms, a direct price may not be charged. Where a direct price is charged, it is likely to be above marginal cost. Pay-TV providers are increasingly offering content and/or services on the basis of asymmetric pricing or zero pricing on a "freemium" basis (offering a basic service for free and enhanced features/content for a subscription fee (i.e. the basis on which the Internet developed)).

Where a direct price is charged, high fixed costs and low marginal costs of distribution mean the "competitive price" is likely to be above marginal cost.[525] Also, the socially-optimal pricing structure may require some form of

[524] *MSG Media Service* (n 512) [32].

[525] 'Market Definition and Market Power in Pay TV: Annex 13 to Pay TV Market Investigation Consultation' (Ofcom, 18 December 2007) para 3.7

price discrimination.[526] The focus is usually on the use of price discrimination as a means of deterring entry. A recent empirical study of the Spanish local television industry suggests however, that in the context of television advertising, incumbents may in fact use price discrimination on the advertising side as a strategic variable to accommodate entry.[527] Nevertheless, the practice of price discrimination makes it more difficult to determine the competitive price for the purpose of applying the SSNIP test. The profitability of an increase in price on one side of the market will be affected by interactions with the other side(s) of the market, further complicating the task of identifying the competitive price.

Applying the SSNIP test to current prices may suggest that the relevant market should be widened to include rival networks/services, giving rise to the "cellophane fallacy". The cellophane effect compromised the scope for Ofcom to apply the SSNIP test in its Third Pay-TV Consultation.[528] Evidence relating to Sky's prices was found to be inconclusive as to whether such prices were above the competitive level.[529] As already indicated, the "cellophane fallacy" may be resolved by adopting a qualititative approach in applying the SSNIP test which refers, for instance, to evidence on the performance of the firms and direct measures of market power. To this end, Ofcom used a range of evidence in its assessment of the market and Sky's market power.[530]

<https://www.ofcom.org.uk/__data/assets/pdf_file/0013/50602/an13.pdf> accessed 13 August 2017.

[526] ibid.

[527] Ricard Gil, Daniel Riera-Crichton and Christian Ruzzier, 'As Seen on TV: Price Discrimination and Competition in Television Advertising' (Munich Personal RePEc archive paper no.75993, 21 December 2016) <https://mpra.ub.uni-muenchen.de/75993/1/MPRA_paper_75993.pdf> accessed 10 May 2017.

[528] 'Pay TV Phase Three Document: Proposed Remedies' (Ofcom, 26 June 2009) para 4.44 <https://www.ofcom.org.uk/__data/assets/pdf_file/0032/49658/paytv_condoc.pdf> accessed 13 August 2017.

[529] 'Pay TV Market Investigation: Consultation Document' (Ofcom, 18 December 2007) <https://www.ofcom.org.uk/__data/assets/pdf_file/0014/54005/pay_tv.pdf> accessed 13 August 2017.

[530] Ofcom (n 528) 63.

The importance of qualitative considerations also arose in the Australian *C7* case (discussed below):

> As we understand it, the test looks to the actual or likely effect of competitive conduct […] However competitive conduct may not have an immediate and obvious effect […] Particularly in a relatively new industry, competitors may be looking for longer term, rather than shorter term, advantages. […] The SSNIP test addresses the effects of competition, but it does not define the way in which it occurs.[531]

The European Commission is similarly aware of this issue within the broader context of predatory pricing in network industries:

> [U]ndertakings should not be penalised for incurring *ex post* losses where the *ex ante* decision to engage in the conduct was taken in good faith, that is to say, if they can provide conclusive evidence that they could reasonably expect that the activity would be profitable.[532]

Conduct is therefore not assessed against hypothetical or theoretical alternatives that might have been more profitable. The focus is instead on economically rational and practicable alternatives that can reasonably be expected to be profitable, having regard to the conditions of the market.[533]

The *C7* case followed claims by Seven that, between 1999 and 2001, News Ltd, PBL and Telstra parties engaged in anti-competitive conduct contrary to Sections 45 and 46 of the CCA. It was alleged that News Ltd, PBL and Telstra

[531] *Seven Network* (n 498) [670].
[532] European Commission Guidance on Article 102 (n 40) fn 43.
[533] ibid para 65.

parties had acquired AFL and NRL rights to put Seven's C7 sport subscription channel out of business. Seven suggested that this was aimed at enabling Fox Sports to dominate the markets for the supply of sports channels to pay-TV suppliers and the supply of pay-TV services to subscribers. As already noted, to determine a substantial lessening of competition within the meaning of Section 45, it is necessary to establish the nature and scope of the relevant market. Market definition was in fact critical to the outcome of this case.

Seven pleaded separate markets for FTA and pay-TV rights to the AFL and NRL, on the basis that FTA television does not impose a close competitive constraint on pay-TV providers to pay a competitive price for pay-TV rights.[534] This required Seven to establish a wholesale sports channel market. At first instance, Sackville J accepted that the SSNIP test should be applied to the competitive price, rather than the monopoly price, in order to avoid the "cellophane fallacy" and an overly broad market definition.[535] However, in the absence of sufficient quantitative data, emphasis was placed on adopting a qualitative approach.

Sackville J concluded that Seven had failed to establish a wholesale sports channel market.[536] On appeal to the Federal Court of Australia ("FCA"), News Ltd suggested that Seven's emphasis upon aspects of the evidence as disclosing close competition was inconsistent with the way the trial had been conducted.[537] The FCA concluded that the case had been conducted on the basis that, in order to assess the extent to which C7 constrained Fox Sports' conduct as a supplier of sports channels with a "marquee sport", all of the evidence had to be examined using the SSNIP test as an aid to such assessment.[538] This was taken to mean that all of the evidence had to be

[534] *Seven Network* (n 496) [1813].
[535] ibid [1779].
[536] ibid [41].
[537] *Seven Network* (n 498) [671].
[538] ibid.

examined in order to determine whether it should be inferred that C7 constrained Fox Sports' conduct in connection with prices, quality and other conditions of supply.[539] This was found to not be the case, so Seven's claim failed.

4.3.2.3 Impact of bundling on market definition in the premium pay-TV context

The SSNIP test was developed within the context of the supply of independent products. Whether it involves the bundling of content into channels, channels into packages or pay-TV with other communications services, bundling does not necessarily disapply the standard principles of market definition. However, it does complicate the assessment of substitutability by increasing the number of products that may need to be taken into consideration. In the case of pure bundling, where products are available only as part of a bundle (i.e. a form of tying), it is necessary to ascertain whether the bundle is substitutable for any other bundles.

More commonly in the communications sector is the incidence of mixed bundling, where bundled products are also available as standalone products but offered at a discount and/or with improved functionality as a bundle. Ofcom suggests that the proportion of homes in the UK buying at least two services from the same supplier as part of a bundle more than doubled to 75 per cent in 2016.[540] Deloitte reports that, in Australia, the percentage of pay-TV subscribers who would prefer to pay for shows on an individual basis, rather than for packages of channels, is on the rise.[541]

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[539] ibid.

[540] Ofcom (n 271) 13.

[541] Deloitte suggests that this is likely to be a consequence of the powerful draw of cult programming/hit shows, and the introduction of SVOD services that are structured around a catalogue of shows and movies, rather than channel propositions. 'Media Consumer Survey 2016: Australian Media and Digital Preferences' (5th edn, Deloitte 2016) 18 <http://landing.deloitte.com.au/rs/761-IBL-328/images/Media_Consumer_Survey_Report.pdf?mkt_tok=eyJpIjoiWVRZeU56TTBZamN4T1RFeSIsInQiOiJNWmU5UU1Ya3luRlUrNlJnNzlOM3JhRXdtRGQ4NXZcL3N1dXVPODVoRVZRbzVtMEo4MDRQRE

A key challenge in the case of mixed bundling is determining the demand for the bundle and the services within the bundle as standalone services. The conceptual approach under the SSNIP test implies that an increase in the price of the bundle as a whole should be considered. It is necessary to determine whether two different bundles are in the same market, or whether the bundle is in the same market as its constituent products. Starting with the bundled product, the question is whether consumers would "unpick" a bundle and purchase its constituent products in the event of a SSNIP.

A bundle may form the relevant product market.[542] The SSNIP test has been applied by Pereira, Ribeiro and Vareda to indicate that triple-play products are a relevant product market in Portugal.[543] This may have significant implications for the assessment of market power in such markets by diluting findings of market power. The treatment of bundles as a relevant product market has been argued by dominant firms in a number of key EU bundling/tying cases.[544] This is unsurprising given the need to identify separate markets in order to demonstrate that a firm is leveraging market power. However, based on an assessment of demand-side substitution, evidence of separate consumer demand for bundled/tied products as standalone services has been used to define distinct markets for bundled/tied products.[545]

N4ZWFmaThSZ1JVK2RcL004YVMyeHBBOXdEU240aVJORWFPSWZXcFRDWFpoWWtsN3FIQ1hTQkpnPSJ9> accessed 13 August 2017.

[542] Explanatory Note accompanying the Commission's Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (European Commission staff working document no.298, 9 October 2014) section 3.2.

[543] Pedro Pereira, Tiago Ribeiro and João Vareda, 'Delineating Markets for Bundles with Consumer Level Data: The Case of Triple-Play' (2013) 31(6) *International Journal of Industrial Organization* 760.

[544] *Tetra Pak II* (Case IV/31.043) OJ L(1992)72/1; *Microsoft* (Case COMP/C-3/37.792) OJ C(2004)900.

[545] ibid.

In applying the SSNIP test, there may be only a single bundle price. In this case, imputed prices will need to be used. Where there are prices for the constituent products, the use of prevailing prices may show more substitutes than there are (i.e. if the prevailing price is already above the competitive level). In which case, there needs to be an assessment as to whether such prices are indeed at the competitive level, by reference to the profit margin of the supplier, for example.

In addressing whether such a SSNIP would be possible without consumers "unpicking" the bundle, other factors such as economies of scope and transaction cost savings should be taken in consideration. Consumers' switching decisions can also be affected by the bundling of broadcasting and telecommunications services, particularly where there are stipulated service periods and penalties for early termination.[546] Consumers of bundled services may be less sensitive to a relative change in price of one service when it forms part of a bundle, compared to as a standalone service. This is supported by a recent UK study which indicates that when individuals bundle their service they are significantly less likely to change supplier.[547]

4.4 Geographic Market Definition in the Premium Pay-TV Context

Geographic markets in the analogue broadcasting era have typically been defined at the national, or even local, level. This is consistent with the national/regional nature of traditional broadcast television licensing regimes. It is also said to reflect language barriers, cultural factors, and differences between the conditions of competition and regulatory regimes in different

[546] See, Hyungjin Kim and Hyunchul Kim, 'Analysis on Lock-in Effects by Estimating for the Switching Costs in Telecommunications Bundles' (International Institute of Social and Economic Sciences, 2016) <http://www.iises.net/proceedings/27th-international-academic-conference-prague/table-of-content/detail?article=analysis-on-lock-in-effects-by-estimating-for-the-switching-costs-in-telecommunications-bundles-> accessed 26 June 2017.

[547] Tim Burnett, 'The Impact of Service Bundling on Consumer Switching Behaviour: Evidence from UK Communication Markets' (University of Bristol, Centre for Market and Public Organisation working paper no.14/321, April 2014) <http://www.bristol.ac.uk/media-library/sites/cmpo/migrated/documents/wp321.pdf> accessed 13 August 2017.

countries.[548] There are also the technical constraints of establishing physical networks which endure in relation to the laying of broadband networks, for instance. However, trends in the ways in which premium pay-TV is supplied and consumed in the digital era indicate that the geographic scope of markets in this context is broadening to become increasingly global. This broadening of markets will inevitably have implications for the assessment of the market power of traditional pay-TV providers.

4.4.1 General principles for defining the relevant geographic market

The relevant geographic market can be described as the area in which the conditions of competition are sufficiently homogenous and distinguishable from neighbouring areas, due to appreciable differences in the conditions of competition in those areas.[549] As with the definition of the product market, the SSNIP test is typically used to assess the demand and supply dimensions of geographic markets in the UK/EU and Australia. The European Commission begins by establishing an initial working hypothesis based on broad indications as to the distribution of market shares between the parties and their competitors, and a preliminary analysis of pricing and price differences at the national and EU levels.[550] This hypothesis is checked against an analysis of demand-side characteristics (such as local/national preferences, consumer purchasing patterns and product differentiation), in order to establish whether firms in different areas constitute a real alternative source of supply for consumers.[551]

Supply factors may be checked to ensure suppliers located elsewhere do not face impediments in developing their sales on competitive terms throughout

[548] *Newscorp/Telepiù* (n 139) [48]. *BSkyB/KirchPayTV* (Case COMP/JV.37) OJ L(2000)2985 [28-29]; *Bertelsmann/Kirch/Premiere* (Case IV/M.993) OJ C(1998)1439 [23-24].
[549] European Commission Notice on Market Definition (n 443) para 8.
[550] ibid para 28.
[551] ibid para 29.

the whole geographic market.[552] This can include the conditions of access to distribution channels, costs associated with setting up distribution networks, and technical standards and monopolies. For the ACCC, actual sales patterns, the location of consumers, the place of sale and any geographical boundaries that limit trade, serve as a starting point.[553] In addition to historical and current market behaviour, whether consumers would readily turn to more remote suppliers in response to a SSNIP by local suppliers, or whether remote suppliers would choose to enter the local market, is also taken into consideration.[554] An additional factor specific to geographic market definition in the EU is the continuing process of market integration.[555] In the communications context, this includes the creation of a digital single market.[556] This is a possible area for divergence in the approaches to market definition in the UK and at the EU level post-Brexit.

In *Deutsche Telekom*,[557] the European Commission noted the geographic scope of the market should be national to reflect the fact that "[t]he structure of the cable markets in most Member States is subject to different conditions in terms of geography, marketing and legislation."[558] This includes where the incumbent holds a monopoly position, as was found to be the case in *MSG Media Service*. Telekom's statutory monopoly on laying and operating cable networks in public roads led the European Commission to find a national German market for cable television networks.[559] Despite the introduction of competition from private network operators, Telekom was still found to

[552] ibid para 30.
[553] *Fortescue* (n 464) [1022].
[554] ibid.
[555] European Commission Notice on Market Definition (n 443) para 32.
[556] See, 'Digital Single Market: Two Years On' (European Commission, 8 November 2016) <https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-dsm_en_0.pdf> accessed 13 August 2017.
[557] *Deutsche Telekom/BetaResearch* (Case No IV/M.1027) OJ C(1998)1441.
[558] ibid [24].
[559] *MSG Media Service* (n 512) [54].

benefit from a competitive advantage from owning almost all of the television networks in Germany.[560]

4.4.2 Impact of media globalisation on geographic market definition

The ability of viewers to access an increasing amount of content via the Internet and the growth of online streaming challenge the legitimacy of defining the geographic scope of markets in the premium pay-TV context on a national basis. Universal operations of SVOD platforms whose services can be relatively easily adapted to support a multitude of languages, suggest that the geographic scope of the markets for the supply and/or consumption of premium non-sport content at least may become international, if not global. Exceptions will endure to justify narrower geographic markets, such as in relation to rural and regional Australia as a consequence of the so-called digital divide.[561] At the same time, however, as will be discussed further in the following chapter, media globalisation does not render the national or local irrelevant, but arguably rather more important.[562]

Broadening the geographic scope of the market in this way will inevitably have consequences for the assessment of market power. This was acknowledged by the European Commission in 2001 within the context of the music industry in *AOL/Time Warner*.[563] The geographic scope of the market for online music delivery was found to extend beyond national borders and be potentially global.[564] By contrast, it was held that the market for pay-TV

[560] ibid [61].
[561] ACCC Media Merger Guidelines (n 91) para 95. See, 'Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2016' (Roy Morgan Research, 24 August 2016) <https://digitalinclusionindex.org.au/wp-content/uploads/2016/08/Australian-Digital-Inclusion-Index-2016.pdf> accessed 13 August 2017.
[562] It will be argued in the following chapter that neither the interests of consumers nor the public are necessarily best served by the retention of media-specific ownership rules in their existing form (i.e. defined according to territorial borders on a national basis).
[563] *AOL/Time Warner* (Case No COMP/M.1845) OJ L(2001)268/28.
[564] ibid [27].

(like the market for online video distribution) is likely to remain national (due to linguistic requirements of different national audiences).[565]

Uncertainty remains, however, as to the basis for adopting such different approaches to the online delivery of music and audio-visual services, and the distinction drawn between pay-TV and online streaming services. The latter distinction may not have been made if the decision was made today because technological convergence has blurred this distinction. As developments in the technology for the delivery of music and audio-visual services continue to gather pace, this is likely to arise again as an area requiring further consideration. Akin to the importance of adopting a technologically neutral approach towards the distribution of content, the focus should be on how much viewers value what is being supplied.

In *AOL/Time Warner*, the European Commission considered that the focus in the supply of films over the Internet is mainly on US content of international appeal and such films are popular in all of the EEA countries.[566] Whilst the content of US-based SVOD platforms remains popular, less emphasis may have been placed on this if the decision was made today. As already indicated, there is increasing investment by broadcasters in the UK and Australia on the production of original drama and local content in particular offers an opportunity for broadcasters to differentiate their services in the increasingly crowded global marketplace. The question arises as to when the suggested shift away from the definition of markets on a national basis may lead to market definition on an international/global or a local basis.

[565] ibid [36].
[566] ibid.

4.5 Functional Considerations in Defining Premium Pay-TV Markets

The functional dimension of the market refers to the link in the chain of production for a specific product.[567] Where the conduct in issue relates to only one functional level in the supply chain, the functional dimension is likely to be subsumed within the product market definition.[568] Otherwise, determining the relevant functional dimension generally begins with the functional activities of the firm(s) involved in the impugned conduct.[569] The question is whether such functions comprise part of a single market or separate markets.[570] In the premium pay-TV context, this is complicated in particular by the multi-sided nature of pay-TV providers, and uncertainty regarding the effects of multi-homing by viewers and advertisers on the appropriate functional dimension(s) of the relevant market.

4.5.1 Principles of functional market definition

Different functional levels of the market are often complements rather than substitutes. Care must therefore be taken to ensure that different functional levels are not combined into a single product market, where hypothetical monopolists at separate functional levels could each profitably impose a relevant increase in price.[571] Otherwise, combining the functional levels into a single market may violate the principle of identifying the smallest market under the SSNIP test.[572] In the UK, the CMA refers in general terms to the possible effects of vertical integration on the definition of the relevant market. It notes that when considering the substitutes of a wholesale product, it may be necessary to consider substitution possibilities at the

[567] *ACCC v Metcash Trading Limited* [2011] FCA 967 [157].
[568] Neville Norman and Rhonda Smith, 'Functional Market Definition' (1996) 4 *Competition and Consumer Law Journal* 1, 3.
[569] ibid 8.
[570] ibid.
[571] *Metcash* (n 567).
[572] ibid.

downstream level.[573] However, more specific guidance on functional market definition emerges from Australia.

The ACCC states that the starting point for delineating the relevant functional distinctions between media markets are the traditional product distinctions between the upstream markets for the purchase of content and provision of advertising space to advertisers, and the downstream markets for providing content to end users.[574] It recognises that media mergers often raise considerable debate about functional market distinctions because of the multi-sided nature of media products.[575] The negative feedback between advertisers and viewers is relevant to merger analysis under Section 50 of the CCA only where it prevents or exacerbates a substantial lessening of competition.[576] However, the potential significance of functional market definition for the purposes of Australian merger analysis was emphasised in *Metcash*.[577]

Metcash Trading Limited ("Metcash"), Australia's leading wholesale distribution and marketing company, entered into an agreement to acquire Franklins, a wholesale and retail grocery business in New South Wales. The ACCC opposed the acquisition on the basis that it would substantially lessen competition in the wholesale supply of groceries to independent supermarkets in New South Wales and the Australian Capital Territory (in which the major supermarkets did not compete), by removing Metcash's closest and only genuine competitor.[578] At trial, Metcash was found to be so

[573] For instance, where vertically-integrated suppliers compete in the retail supply of a product, the ability of consumers to switch suppliers at the retail level may constrain the ability of the supplier to raise the price of the wholesale product. CMA Market Definition Guidelines (n 442) para 5.12.
[574] ACCC Media Merger Guidelines (n 91) para 109.
[575] ibid para 98.
[576] ibid para 107.
[577] *Metcash* (n 567).
[578] 'ACCC to oppose Metcash proposed acquisition of Franklins supermarkets' (ACCC media release NR250/10, 17 November 2010) <https://www.accc.gov.au/media-release/accc-to-oppose-metcash-proposed-acquisition-of-franklins-supermarkets> accessed 13 August 2017.

closely involved in the retail activities of stores under the Independent Grocers of Australia ("IGA") brand (owned by Metcash), that market participants included (amongst others) Coles, Woolworths, Franklins-branded stores and IGA-branded stores.[579] The Full Court of the Federal Court of Australia ("FCAFC") agreed the acquisition would not substantially lessen competition but rather enable IGA retailers to compete more vigorously with the major supermarkets.[580] In doing so, it stressed the importance of applying the economic concept of a market "in a practical way to accommodate the concerns of the [CCA] with those of business and commerce."[581]

4.5.2 Functional issues relating to the multi-sided nature of pay-TV providers

Functional issues can arise in defining markets in the premium pay-TV context as a result of the interactions between the viewer-side and the advertiser-side of pay-TV providers as multi-sided platforms. The ACCC acknowledges the complexities associated with the non-complementary interaction between viewers and advertisers as a consequence of the multi-sided nature of advertising-funded media products.[582] It concludes, however, that such interactions are present in other non-media mergers and simply represent "new applications of existing competitive analytical tools."[583] By contrast, Ofcom has explicitly opted to disregard the effects on advertising markets of a price rise to retailers and, in doing so, err on the side of defining markets too broadly.[584] This is consistent with the fact that, in the UK/EU, functional considerations generally form part of the analysis of the relevant product market under the application of the SSNIP test.

[579] *Metcash* (n 567) [337-342].
[580] ibid [460]; *ACCC v Metcash Trading Limited* [2011] FCAFC 151 [385].
[581] ibid [382].
[582] ACCC Media Merger Guidelines (n 91) para 109.
[583] ibid.
[584] Ofcom (n 525) para 4.33.

It is suggested here, however, that interactions between the viewer-side and the advertiser-side are likely to present more significant functional considerations than is appreciated under Ofcom's approach. Ofcom assumes that an increase in a wholesale price to a retailer, if fully passed on to consumers, is likely to lead viewers to switch away with a consequent downward effect on advertising revenue.[585] However, this arguably over-simplifies the relationship between advertising revenue and the size of the audience, and the possible effects of viewers switching supplier (though it has been noted that the scope for switching is particularly limited in the premium sport context). It has already been identified that the amount of advertising revenue is not simply dependent on the number of viewers but, for instance, the demographic and attention value of the audience.

Ofcom considers that excluding the downward effect on advertising revenue from viewers switching suppliers is likely to over-estimate the profitability of a wholesale price increase and lead to broader market definitions.[586] It assumes that given the importance of revenue from subscriptions relative to advertising revenue for premium channels, this effect is likely to be relatively small.[587] However, in view of the increasing significance of advertising revenue within the business models of traditional pay-TV providers and new entrants alike, it is proposed that the downward effect on advertising revenue may well be more significant than this suggests. Excluding this effect will not necessarily produce broader market definitions. Much will depend upon the period of time over which the assessment is based, but also the likely effects of multi-homing and ad-skipping on the exercise of market power by traditional pay-TV providers.

[585] ibid 58.
[586] ibid.
[587] ibid.

4.5.3 Effects of multi-homing on market power in traditional pay-TV

Multi-homing by viewers in both the UK and Australia has relatively quickly become commonplace. Viewers in the UK use an average of 3.5 sources across all platforms in the consumption of news.[588] In Australia, 76 per cent of online Australians watch television and use the Internet simultaneously, and 33 per cent access content on two or more devices whilst watching television.[589] As with the possibility of switching, viewer multi-homing generates inefficiency in the process of matching advertisers to viewers, since advertisers may not reach some viewers and impose on others too much.[590]

The ability of viewers to skip or block television advertisements threatens to restrict the ability of media firms to monetise their online video content in particular. Ad-block penetration per online capita in the UK and Australia is 16 per cent and 20 per cent, respectively.[591] It is reported that 12million people in the UK use ad-blockers, at an estimated cost in 2015 to publishers worldwide of around £15billion.[592] One response of broadcasters is to make use of anti-ad blocking technology, to reassure advertisers that their content will be seen by their intended audiences.[593] However, there is a balance to be struck, as exemplified by the experience of the digital terrestrial television

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[588] 'News Consumption in the UK: Research Report' (Ofcom, 15 December 2015) 13 <https://www.ofcom.org.uk/__data/assets/pdf_file/0020/77222/News-2015-report.pdf> accessed 13 August 2017.

[589] 'More Screens, Choice and Activities Across Devices: Q1 2016 Australian Multi-Screen Report' (Oztam, Nielsen and Regional Television Audience Measurement, 8 June 2016) <http://www.oztam.com.au/documents/Other/Q1%202016%20Australian%20Multi-Screen%20Report%20release.pdf> accessed 14 August 2017.

[590] Susan Athey, Emilio Calvano and Joshua S Gans, 'The Impact of Consumer Multi-homing on Advertising Markets and Media Competition' *Management Science* (16 December 2016) <http://pubsonline.informs.org/doi/10.1287/mnsc.2016.2675> accessed 14 August 2017.

[591] '2017 Global Adblock Report: The state of the blocked web' (PageFair, February 2017) 8 <https://pagefair.com/downloads/2017/01/PageFair-2017-Adblock-Report.pdf> accessed 11 August 2017.

[592] Mindi Chahal, 'What does the rise of ad blocking mean for video?' (Marketing Week, 18 February 2016) <https://www.marketingweek.com/2016/02/18/what-does-the-rise-of-ad-blocking-mean-for-video/> accessed 11 August 2017.

[593] Harry Tucker, 'Australian TV networks are trying to combat ad blockers' *Business Insider Australia* (11 April 2016) <https://www.businessinsider.com.au/australian-tv-networks-are-trying-to-combat-ad-blockers-2016-4> accessed 11 August 2017.

platform Freeview in Australia. A strict ban on ad-skipping meant that Freeview was not taken up by a number of television services. The ban was subsequently revised in order to get FreeviewPlus catch-up television into more Australian homes.[594]

The consumption of content by viewers across multiple platforms may also reduce the value of viewers to advertisers by reducing the quality of viewer attention (particularly in the light of the rise of social media and the use of social media to complement the consumption of content on other platforms). Audience research over the past 30 years has shown that there is no single mode of attention that can be attributed to an audience.[595] Sometimes viewing is distracted and sometimes it is fully engaged.[596] However, a recent study by Athey, Calvano and Gans indicates that higher readership attracts higher per-consumer revenues, so consumer switching increases a publisher's incentive to invest in quality content that attracts a greater share of consumers.[597] This suggests that high-reach publishers have an advantage over traditional publishers.[598] In the premium pay-TV context, it reinforces the potential significance of the high subscriber figures of global operations like Netflix, compared to the audience shares of the likes of Sky and Foxtel.

As regards the impact of multi-homing by advertisers, it has already been acknowledged that traditional broadcast television remains a principal platform for the consumption of audio-visual content in both the UK and Australia. However, second or ancillary screens are said to hold the key for advertisers to monetise an increasingly fragmented audience.[599] For instance,

[594] Adam Turner, 'Freeview relaxes ad-skipping restriction' *The Sydney Morning Herald* (4 June 2015) <http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/freeview-relaxes-adskipping-restrictions-20150603-ghg1kh.html> accessed 13 August 2017.
[595] Sherryl Wilson, 'In the Living Room: Second Screens and TV Audiences' (2016) 17(2) *Television and New Media* 174, 182.
[596] ibid.
[597] Athey, Calvano and Gans (n 590).
[598] ibid.
[599] Wilson (n 595) 178.

Athey, Calvano and Gans assume higher-value advertisers endogenously purchase multiple advertisements on multiple publishers because higher-value advertisers find the value of advertising across publishers to be greater than the market price.[600] However, uncertainty remains as to how the possible effects of viewer multi-homing, specifically in the consumption of premium pay-TV, are mitigated (if at all) by the ability and incentive for advertisers to multi-home.

4.6 Temporal Factors in Defining Markets in the Premium Pay-TV Context

In the premium pay-TV context, it is in relation to live sports coverage that temporal considerations would appear most pertinent, such as how often exclusive rights contracts come up for renewal. The temporal dimension of markets for the supply of live sports coverage is also relevant in the sense that such coverage is a perishable good. Given the interest of spectators in uncertainty of outcome, the interest of viewers (and hence advertisers) in televised sport is time-sensitive.[601] The commercial value of a live sporting event diminishes as soon as the event takes place i.e. once there is no longer uncertainty of outcome. This remains unchanged in the digital era, where the greatest scope for change and therefore the focus here is in relation to premium movies and drama. The decreasing significance of movie release windows and the simultaneous supply online of whole series of exclusive dramas raise important questions about the appropriate timeframes for defining markets in the movie and drama contexts. This may have implications for the assessment of market power held by traditional pay-TV providers in such markets.

[600] Athey, Calvano and Gans (n 590)
[601] Chris Gratton and Harry A Solberg, *The Economics of Sports Broadcasting* (Routledge 2007) 145.

4.6.1 Timeframe for assessing substitution possibilities

The timeframe over which demand-side and supply-side substitution are assessed is relevant in applying the SSNIP test to define the product and geographic markets. However, there may be a distinct temporal aspect to the relevant market. The CMA briefly notes in its Market Definition Guidelines how the timing of production and purchasing can affect markets, but the temporal dimension is ultimately an extension of the product dimension of the relevant market.[602] Temporal market definition is not expressly referred to in the European Commission's Notice on Market Definition. In *United Brands*,[603] the United Brands Company argued that the sale of bananas was subject to seasonal change, particularly in the summer months, when faced with competition from summer fruits.[604] However, the ECJ concluded that any impact on banana sales was insufficient for other fruit to be regarded as forming part of the same market.[605]

An emphasis on short-run analysis was reinforced in *Tetra Pak II*.[606] Tetra Pak was a world leader in the field of packaging liquid and semi-liquid foods in cartons (and effectively sole producer in the EU of machines for the aseptic packaging of liquid foods and the cartons used in such packaging). It was alleged that Tetra Pak had abused its dominant position through predatory and discriminatory pricing, and tying the sale of cartons and machines. Tetra Pak argued the relevant market should include a variety of other forms of aseptic and non-aseptic packaging to form a packaging market for liquid foods. However, the European Commission rejected this on the basis that the different forms of packaging competed with one another only in the long-term:[607]

[602] CMA Market Definition Guidelines (n 442) paras 5.1-5.3.
[603] *United Brands* (n 32).
[604] ibid [15].
[605] ibid [21].
[606] *Tetra Pak II* (n 544).
[607] ibid [93].

> The reason why […] the analysis used to define a market should cover only a short period is that over a long period, during which techological progress may occur and consumer habits evolve, structures will change and the very boundaries between the various markets shift. A short period corresponds more to the economic operative time during which a given company exercises its power on the market […].[608]

As already indicated, such a short-term approach to the assessment of the exercise of market power as a static exercise is not likely to be appropriate in the pay-TV industry because of strong dynamic competition. Chapter 3 demonstrates how this is reinforced in the digital era. The focus in Australia on assessing substitution possibilities in the longer-run is therefore arguably more appropriate. However, the Australian approach arguably still requires refinement in defining markets in the digital era.

The approach to temporal market definition should reflect the conduct in issue and the specific economic characteristics of the industry in question. In the premium sport context, this includes high capital investment and long-term exclusive contracts. In the *Superleague* case,[609] Burchett J suggested that the appropriate period of time for considering the competitive forces was at least 10 years.[610] Notably, the decision in this case did not turn on the definition of the relevant market. A period of 5 years would arguably now be more appropriate to reflect the regularity of rights auctions.

[608] ibid [94].
[609] *News Ltd v Australian Rugby Football League Ltd* [1996] FCA 1256.
[610] ibid [95].

4.6.2 Relevance of release windows in defining premium movie markets

In the premium movie context, the impact of the system of release windows on the ability of different types of broadcasters to access the rights to premium movies has formed the basis for defining a series of separate markets for the supply of premium movies. Release windows refer to the period of time between the public release of a movie in cinemas and its release on VOD, DVD, pay-TV and FTA television. For instance, the traditional release of movies on pay-TV before FTA television has been interpreted as preventing FTA broadcasters from competing effectively for the pay-TV rights to premium movies.[611] In 2011, the European Commission identified separate markets for the release windows for VOD, pay-per-view, the first pay-TV window, the second pay-TV window and FTA television.[612]

However, the declining significance and shrinking of release windows reinforces the decreasing appropriateness of product-based distinctions (i.e. based on the mode of distribution) and the need to adopt a broader conceptualisation of competition across the wider communications sector.[613] Relevant to this analysis is the shrinking of release windows for premium movies. It is reported that Hollywood studios are preparing to release movies for home viewing less than 45 days after they debut in cinemas (halving the prevailing standard of 90 days).[614] In some instances, release windows have been dispensed with altogether, with the simultaneous release of movies in cinemas and on pay-TV, the Internet, DVD and FTA television, at effectively

[611] 'British Sky Broadcasting Group PLC and Manchester United PLC: A Report on the Proposed Merger' (Monopolies and Mergers Commission, 1999) para 2.51.
[612] *HBO/Ziggo/HBO Nederland* (Case COMP/M.6369) OJ C(2011)10049 [18].
[613] On the changing nature of the system of release windows in the EU, see 'Analysis of the Legal Rules for Exploitation Windows and Commercial Practices in EU Member States and of the Importance of Exploitation Windows for New Business Practices' (European Commission, 2014) <https://ec.europa.eu/futurium/en/system/files/ged/analysisofthelegalrulesforexploitationwindows.pdf> accessed 8 September 2017.
[614] Ben Fritz, 'From Multiplex to Living Room, in 45 Days or Less' *The Wall Street Journal* (26 March 2017) <https://www.wsj.com/articles/from-multiplex-to-living-room-in-45-days-or-less-1490532001> accessed 13 August 2017.

the same time.[615] The definition of separate markets for each release window must be supported by an analysis of substitutability between the different release windows or formats.

4.6.3 Temporal dimension of premium drama markets

The success of premium drama series lies in their release exclusively from a particular SVOD platform or pay-TV provider. Whole series are often released at once, consistent with the current trend of viewers binge-watching the latest "box set" at the time of release or at some later date. Application of the general approach to temporal market definition suggests the likely definition of narrow markets, potentially for the release of individual dramas.[616] This would have significant implications in terms of the likely over-estimation of market power and unnecessarily impeding innovation incentives. Given the rise of premium drama, this is arguably an area in need of detailed consideration.

4.7 Conclusions

Network effects, multi-homing, the perishable nature of live sports events, and the role for exclusivity and long-term supply arrangements, together render markets in the premium pay-TV context unique. This does not in itself disapply the standard conceptual framework for market definition. However, it has been identified that the SSNIP test will be of limited application in defining relevant product and geographic markets in this context. Asymmetric

[615] For example, *A Field in England* was the first UK film to be released simultaneously in cinemas, on DVD, on television and via VOD. Samuel Wigley, 'A Field in England marks UK distribution first' (British Film Institute, 2 November 2015) <http://www.bfi.org.uk/news-opinion/news-bfi/features/field-england-marks-uk-distribution-first> accessed 13 August 2017. In Australia, the retention of movie release windows forms part of a wider effort to combat particularly high rates of online piracy. Ben Grubb, '"Piracy window" for movie downloads reduced' *Sydney Morning Herald* (16 June 2014) <http://www.smh.com.au/digital-life/digital-life-news/piracy-window-for-movie-downloads-reduced-20140616-zs93v.html> accessed 13 August 2017.

[616] The definition of separate markets for individual blockbusters over a limited period of time has been envisaged elsewhere. See, Damien Geradin, 'Competition Law Problems Raised by the Entry of Incumbent Telecommunications Operators in the Media Content Delivery Market' (2005) 6(3) *Journal of Network Industries* 143.

pricing and bundling by pay-TV providers as multi-sided platforms require consideration of interactions between the viewer-side and advertiser-side. Data issues can arise in relation to revenue and subscriber figures where pay-TV providers supply content/services at home and abroad via the Internet. The increasing focus on dynamic competition also limits the scope for adopting a quantitative approach on which the SSNIP test relies. This reinforces the importance of supplementing quantitative analysis with a qualitative assessment of the market.

As regards the factors that should form part of a qualitative assessment of the market, less emphasis should be placed on product-based distinctions founded on analogue-era assumptions regarding the trading relationships and funding models of traditional pay-TV providers and other broadcasters. Comparisons at the technological level should be replaced by consideration of how such content/services affect the overall experience of viewers as the consumers of bundled communications services. As will be seen in the following chapter, this approach was evident to some extent in the European Commission's recent assessment of Facebook's acquisition of Whatsapp.[617] However, from a market definition perspective, there needs to be a clear and consistent framework for determining, in the first instance, whether the "cellophane fallacy" is a potential issue (where a direct price is charged) and, in resolving the "cellophane fallacy", consideration of other evidence and more direct measures of market power.

With the bundling of pay-TV and increasing incidence of vertical integration, functional market considerations are increasingly important. Ofcom's disregard for the effects of price increases on the advertising side is therefore likely to lead to inaccurate market definitions, and not necessarily broader market definitions as it assumes. In this respect, the UK may have something

[617] *Facebook/WhatsApp* (n 58).

to learn from the more substantive guidance on functional market definition that emerges from Australia. This is subject to enduring uncertainty regarding the application of such guidance in the premium pay-TV context. For instance, the practical application of the FCAFC's statement in *Metcash* on the correct approach in the event of conflict between the concerns of the CCA and the interests of pay-TV providers. Appropriate consideration of the functional dimension of the relevant market is important for ensuring against unduly narrow market definitions and hence the over-assessment of market power.

In a similar vein, it is suggested that the continuing process of media globalisation implies wider market definitions (particularly in relation to premium non-sport content). There is likely to be a shift from defining markets on a national basis towards the definition of international, if not global, markets. In this respect, the potential for change is arguably most pronounced in the context of premium drama. Broadening the geographic scope of premium pay-TV markets in this way will have implications for the assessment of the market power held by traditional pay-TV providers. This is especially significant given the increasing importance of premium drama within the business models of SVOD platforms and, in response, traditional pay-TV providers. At the same time, however, the suggested increase in the importance of local drama highlights a possible tension between the local and the global in determining the geographic scope of markets in the premium drama context. The significance of this tension is reinforced by the fact that, as already indicated, it is in the premium drama context that new entry poses the greatest scope for undermining the market positions of traditional pay-TV providers.

From a temporal perspective, broader market definitions are also likely to result from the decreasing significance and shrinking of movie release windows. Defining appropriately broad temporal markets for premium drama

will also be important for reflecting the impact of new entry by SVOD platforms on the market power of traditional pay-TV providers. The temporal aspect of premium drama markets is also an area in need of particular consideration because of the simultaneous release of exclusive drama series in their entirety, which could lead to unduly narrow market definitions for individual series. Whether viewers choose to watch whole series around the date of release or at some later date may also be relevant in defining the product market. An issue which emerges here and reappears later in the thesis is whether premium pay-TV content/services constitute substitutes or complements. This is critical because, as seen within the context of market definition, the central concept in the existing regulatory frameworks is typically one of substitutability rather than complementarity. Meanwhile, significant uncertainty remains amongst economists on the appropriate approach to assessing substitutability where the SSNIP test cannot be applied.

CHAPTER 5

MEDIA OWNERSHIP AND MERGER REGULATION OF PREMIUM PAY-TV

5.1 Introduction

Concentration of media ownership raises particular regulatory concerns due to the public interest in the role for the media in ensuring the effective functioning of a democratic society.[618] By ensuring that no single media proprietor can exercise excessive influence over the political process, media plurality offers citizens access to a diversity of viewpoints from which to make informed decisions. Regulating market concentration through the enforcement of merger control rules can promote media pluralism. However, plurality issues can arise in the absence of competition concerns. Also, in the event of countervailing efficiencies, general competition law may tolerate a level of market concentration that is undesirable from a plurality perspective. Hence the introduction in the analogue era of media-specific ownership rules to operate alongside merger regulation under general competition law.[619]

In an era of content abundance, media pluralism remains a regulatory concern, including within the context of premium content. However, this chapter demonstrates the importance of ensuring that mergers in this context are assessed in the light of the reinforced tendency towards market concentration in the digital era, as a consequence of the rise of the multi-media firm. In this regard, the liberalisation of media-specific ownership rules in the UK is regarded as apt. Though such liberalisation did form part of a package of reforms under the EA2002 (as amended by the CA2003), which crucially included the introduction of a media-specific public interest test. It

[618] Secretary of State for Trade and Industry and the Secretary of State for Culture, Media and Sport, *A New Future for Communications* (White Paper, Cm 5010, 2000) 35.

[619] Protection of the public interest in media pluralism also relies, for instance, on the effective enforcement of rules relating to journalistic and editorial independence, television advertising, conflicts of interest, and impartiality and accountability.

is proposed that a modified version of this test could form the basis for the introduction of such a test in Australia. This could also be used to address concerns about local media ownership, thereby supporting the case for liberalisation of local media ownership rules in Australia. However, the UK regulatory framework is not beyond criticism as regards its application to media mergers in the digital era. In the light of this, the chapter proposes modifications to minimise the regulatory restrictions that may otherwise be unnecessarily imposed in both the UK and Australia on the rise of the multi-media firm in an increasingly global communications industry.

5.2 Concentration of Media Ownership, Competition and the Public Interest

Media ownership is distinguished from the ownership of other assets by the role for the media in facilitating and promoting an informed democratic society.[620] The public interest lies in viewers being able to access a diversity of viewpoints. Excessive concentration in media ownership may lead to the over-representation or under-representation of particular political viewpoints, and marginalisation of certain social or cultural values.[621] The public interest in viewpoint diversity is therefore assumed to be best served by less concentrated markets.[622] However, the relationship between market concentration and media pluralism or diversity is more complex than this suggests, particularly in innovation-driven industries like premium pay-TV.

5.2.1 Meaning of the public interest in media pluralism and diversity

Media pluralism and diversity are closely-related but distinct concepts. "Media pluralism" is used to refer to a multiplicity of independent media

[620] HL Select Committee on Communications (n 53) vol 1, 62.
[621] Gillian Doyle, *Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media* (SAGE Publishing 2002) 13.
[622] This implies that a higher number of media outlets ensures a greater range of viewpoints but, as will be seen, this is not necessarily the case.

owners and "media diversity" to diversity of content.[623] So whilst media diversity typically refers to the range of different programmes or services that are available to viewers, media pluralism can be said to refer to the choices for viewers between the suppliers of such programmes or services.[624] However, as Hitchens notes,[625] the term "media pluralism" is almost never used in Australia, where "media diversity" is often used to connote both internal and external pluralism.[626]

Media pluralism can also be used to refer to both plurality of suppliers (external pluralism) and diversity in the range of content (internal pluralism). Plurality in the ownership of media outlets does not guarantee diversity of content, but it does at least provide the possibility for media diversity.[627] The number of media outlets that may ensure media plurality is context-dependent. It will depend, for instance, on the economics of the relevant market, the type of owner, management strategies and consumer preferences.[628] Brocas et al find that a market with four firms has better information transmission than a market with two firms, and there is an additional increase in efficiency in the presence of six independent firms.[629] As will be seen, however, a purely quantitative approach does not have due regard to the complexity of the media landscape.

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[623] Rachael Craufurd Smith, 'Bright-Line versus Responsive Regulation: Some Thoughts from the United Kingdom' in Robert Picard, Miklos Sukosd and Peggy Valcke, *Media Pluralism and Diversity: Concepts, Risks and Global Trends* (Palgrave Macmillan 2015) 311.

[624] Secretary of State for Trade and Industry and the Secretary of State for Culture, Media and Sport (n 618).

[625] Lesley Hitchens, 'Reviewing Media Pluralism in Australia' in Picard, Sukosd and Valcke (n 623) 252.

[626] ibid. 'Media Diversity, Competition and Market Structure: Discussion Paper' (Department of Broadband, Communications and the Digital Economy, 2011) 11. The thesis generally uses media pluralism to refer to the number of suppliers and media diversity to refer to diversity of content.

[627] Craufurd Smith (n 623) 312.

[628] ibid.

[629] Rachael Craufurd Smith and Damian Tambini, 'Measuring Media Plurality in the United Kingdom' (2012) 4(1) *Journal of Media Law* 35, 59; Isabelle Brocas, Juan D Carrillo and Simon Wilkie, 'A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied' (FCC media study no.9, June 2011) 3 <https://apps.fcc.gov/edocs_public/attachmatch/DOC-307525A1.pdf> accessed 30 March 2017.

A more holistic approach is required in defining the public interest in media pluralism. This is supported by the study on monitoring media pluralism commissioned by the European Commission.[630] The study employs a working definition of media pluralism based on a range of factors including the diversity of media supply, use and distribution in relation to ownership and control, media types and genres, political viewpoints, cultural expressions, and local and regional interests.[631] Such a variety of factors demonstrates how media pluralism cannot legitimately be reduced to purely quantitative measures of concentration in ownership.[632] This is reinforced by the enduring uncertainty regarding the relationship between diversity of ownership and diversity of content.

5.2.2 Relationship between market concentration and diversity of content

Media market concentration can arise from the mono-media merger of firms at the same level in the supply of a particular media product, or cross-media mergers between firms at different levels in the supply of a particular media product or different types of media. The consequent reduction in the number of media outlets may enable the merged firm to exercise market power in a way that substantially lessens competition and perhaps reduces diversity of content. By regulating the concentration of market power, the enforcement of merger control rules can produce outcomes that support content diversity.[633] However, the focus of merger control rules on safeguarding against the anti-competitive effects of the exercise of market power (as

[630] Professor Peggy Valcke *et al*, 'Independent Study on Indicators for Media Pluralism in the Member States - Towards a Risk-Based Approach', Final Report, Annex III, UK Country Report (Prepared for the European Commission Directorate-General Information Society and Media, July 2009) 8 <http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/pfr_report.pdf> accessed 13 August 2017.
[631] ibid 5.
[632] ibid 8.
[633] The Rt Hon Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press: Report' (The Stationary Office, November 2012) 182 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270939/0780_i.pdf> accessed 13 August 2017.

opposed to its mere existence), means that general competition law may tolerate a level of market concentration that is considered undesirable from a media plurality perspective.[634]

Ownership has been described as the best proxy for viewpoints on the basis that having editorial control and setting the news agenda places media owners in a position to influence what is said and how it is said.[635] Having a number of different sources provides the possibility that new and different voices may emerge. However, it does not guarantee diversity of content. According to Hotelling's principle of minimum differentiation,[636] where there is non-price competition in competitive markets (as in the case of advertising-funded television, for instance), rational profit-maximising firms will gravitate towards supplying programmes aimed at the median of the spectrum of consumer taste.[637] This principle remains relevant within the context of digital broadcasting because, in an era of content abundance, user attention remains scarce.[638] Certain types of programmes, like crime dramas, remain of mass appeal and are widely replicated across networks. A number of channels may therefore compete by sharing a market for one type of programme of mass appeal and still be more profitable than if they were to individually provide more niche content.

The precise impact of market concentration on content diversity has long provoked debate in academic and policy discourse. A US study in 1992 by Owen and Wildman finds that in an advertising-supported broadcast economy with a limited number of channels, there will be a tendency towards

[634] ibid.
[635] 'Media Ownership Rules Review' (Ofcom, 31 July 2009) paras 2.5 and 2.7 <https://www.ofcom.org.uk/__data/assets/pdf_file/0029/91676/morrcondoc.pdf> accessed 13 August 2017.
[636] Harold Hotelling, 'Stability in Competition' (1929) 39(153) *The Economic Journal* 41.
[637] ibid.
[638] See generally, Greg Taylor, 'Scarcity of Attention for a Medium of Abundance' in Mark Graham and William H Dutton, *Society and the Internet: How Networks of Information and Communication are Changing Our Lives* (Oxford University Press 2014) ch 16.

the duplication of content.[639] In a study commissioned in 1997 by the Council of Europe,[640] Professor Gillian Doyle notes how the level of media pluralism in any given market is influenced by a number of variables including the size of the market, the number of autonomous suppliers, diversity at the content level, and consolidation of editorial or other functions.[641] The study finds that whilst diversity of ownership does not guarantee diversity of output, it positively contributes to pluralism because "[e]ven if all suppliers choose to rely on or share many of the same sources of content, their rivalry will promote a culture of dissent which is healthy for democracy."[642]

A further study commissioned by the Council of Europe almost a decade later concludes there is not a strong link between market concentration and content diversity.[643] It reports that highly concentrated markets can demonstrate similar levels of content diversity as less concentrated markets.[644] This is consistent with a contemporaneous study undertaken for the European Commission which highlights how high market share or concentration may be beneficial for funding certain types of programmes that are considered to be important for pluralism.[645] Interestingly, expensive

[639] Owen and Wildman (n 23).
[640] Gillian Doyle, 'Media Consolidation in Europe: The Impact on Pluralism' (Council of Europe, 19 January 1998).
[641] ibid 7.
[642] ibid 32.
[643] David Ward, 'Final Report: Study on the Assessment of Content Diversity in Newspapers and Television in the Context of Increasing Trends Towards Concentration of Media Market' (Commissioned by the Council of Europe, 2006) 4.
[644] ibid. This is supported by a number of empirical studies, including an early study on radio broadcasting in the US by Steiner which found "a discriminating monopoly controlling all stations would produce a socially more beneficial program pattern", whilst "a collusive oligopoly, pooling outlets and profits, would never engage in duplication". Steiner (n 184) 206. In 2001, Berry and Waldfogel found that reducing the number of radio broadcasters had the effect of increasing the number of formats. Steven T Berry and Joel Waldfogel, 'Do Mergers Increase Product Variety? Evidence from Radio Broadcasting' (2001) 116(3) *Quarterly Journal of Economics* 1009.
[645] 'Impact Study of Measures (Community and National) concerning the Promotion of Distribution and Production of TV Programmes provided for under Article 25(a) of the TV Without Frontiers Directive: Final Report' (David Graham and Associates Limited prepared for the Audiovisual, Media and Internet Unit of the Information Society and Media Directorate-General of the European Commission, 24 May 2005) section 8.2.3 <https://publications.europa.eu/en/publication-detail/-/publication/34ea216b-95ec-4fdc-8c6e-3cff704ff0a3> accessed 13 August 2017.

drama series were included under this heading.[646] The relevance of the concepts of media pluralism and diversity in the context of premium drama, and premium content more generally, is somewhat contentious.

5.2.3 Relevance of pluralism and diversity in the premium pay-TV context

Proceeding on the basis that media pluralism and diversity are integral to the effective functioning of a democratic society, the association between these concepts and content such as news and current affairs is uncontroversial.[647] It is desirable that there is also diversity in respect of other types of content. By contributing to the way that viewers as citizens perceive themselves as a society, other genres (including movies and dramas) may assist in developing the political discourse. However, where the primary function of content is to entertain, the case for intervening in the market on the basis of media diversity is arguably weaker.[648] Premium sport is different in the sense that the socio-cultural functions of televised sport are difficult to dismiss (even if one does not necessarily agree that such functions justify regulation to retain the coverage of major sporting events on FTA television). Interestingly, Ofcom maintains that the scope of any plurality review should be limited to news and current affairs, from which it expressly excludes sports news.[649]

However, it is not necessarily clear where the boundary lies between news and entertainment, particularly in the context of sports coverage. It has been

[646] ibid.

[647] Witness Statement of Vince Cable in the matter of the Leveson Inquiry, 30 April 2012, para 81 <http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Witness-Statement-of-Vince-Cable-MP.pdf> accessed 17 October 2016.

[648] Pay-TV has been distinguished from digital interactive television services on the basis that the latter are largely transactional or informational services, whilst pay-TV is a largely entertainment service. *British Interactive Broadcasting/Open* (Case IV/36.539) OJ L(1999)312/1 [23].

[649] Ofcom takes this position on the basis that news and current affairs are the most relevant forms of content for the delivery of the public policy goals of media plurality. This includes contributing to a well-functioning democratic society by informing citizens and preventing too much influence of one media owner over the political process. 'Measuring Media Plurality: Ofcom's Advice to the Secretary of State for Culture, Olympics, Media and Sport' (Ofcom, 19 June 2012) para 3.16 <https://www.ofcom.org.uk/__data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf> accessed 13 August 2017.

suggested elsewhere that given the way content is now supplied, it is often difficult to isolate news from entertainment, and the concept of media plurality should therefore be extended beyond news and current affairs.[650] The same can also be said for the way in which content is now consumed. The increasing consumption of live sports highlights in real time or near-live on mobile platforms (as a substitute or complement for watching live coverage on television or a computer) raises fundamental questions as to what constitutes "news" and what is meant by consuming content "live". Ofcom's caution about extending the category of news and current affairs to encompass sports news is understandable. However, a continued refusal to include sports news within the category of news (at least as a form of "soft" news) runs the risk of ineffective or counter-productive regulation by failing to reflect market reality.

5.3 Merger Regulation and Media Ownership in the UK

Media mergers in the UK are subject, as in other sectors, to potential scrutiny on competition grounds under the standard merger regime in the EA2002 (as amended by the CA2003). Where there is a concentration with a Community dimension, the EU Merger Regulation applies and the European Commission has sole jurisdiction in relation to such concentrations.[651] Despite this, the UK Secretary of State for Digital, Culture, Media and Sport can intervene in media mergers at the UK and EU levels on public interest grounds. A media-specific public interest test can be desirable from a competition perspective since it may facilitate mergers which might not otherwise take place. However, the

[650] Claire Enders evidence to the Leveson Inquiry, 9 July 2012, para 22 <http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Claire-Enders-Enders-Analysis.pdf> accessed 17 October 2016.

[651] EU Merger Regulation (n 33) arts 21(2) and 21(3).

UK test is not beyond criticism, particularly as regards the substantial degree of discretion that is conferred in applying the test.[652]

5.3.1 Standard merger regime in the UK under the EA2002

The CMA bears primary responsibility for reviewing relevant merger situations under the EA2002. A relevant merger situation arises where two or more enterprises cease to be distinct, or where arrangements are in progress or contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct.[653] Enterprises cease to be distinct if they are brought under common ownership or control.[654] This may take the form of legal control arising from the acquisition of a controlling interest,[655] *de facto* control over commercial policy,[656] or the ability to materially influence commercial policy.[657] Where enterprises cease to be distinct, a merger will be subject to review if it satisfies the "turnover" test or the "share of supply" test.[658] Relevant merger situations that qualify for review are assessed on competition grounds by the CMA against the test of a substantial lessening of competition.[659] A merger gives rise to a substantial lessening of competition when it has a "significant effect on rivalry over time, and therefore on the

[652] See, Rachael Craufurd Smith, 'Is the UK "Media Plurality Test" Fit for Purpose?' (15 July 2011) <http://www.cfom.org.uk/2011/07/is-the-uk-media-plurality-test-fit-for-purpose/> accessed 13 October 2016.
[653] Enterprise Act 2002, ss 23 and 33.
[654] ibid s 26(1).
[655] ibid s 26(2). A "controlling interest" refers to more than 50 per cent of the voting rights at general meeting (with a simple majority being required to pass an ordinary resolution). Companies Act 2006, s 282.
[656] ibid s 26(3). In the absence of a statutory definition of the "ability to control commercial policy", the CMA indicates that where shareholdings are widely dispersed, such control can arise with a shareholding of around 30 per cent. 'Anticipated acquisition by West Midlands Travel Limited of the joint venture shares of Laing Infrastructure Holdings Limited and Ansaldo Transporti Sistemi Ferroviari SpA in Altram LRT Limited' (CMA, 5 April 2006) paras 27 and 33.
[657] ibid s 26(4). "Material influence" is likely to be regarded as conferred by a shareholding of more than 25 per cent, since this is sufficient to block a special resolution. Companies Act 2006, s 283. Lower shareholdings may suffice where there are indications of the ability to exercise material influence.
[658] Enterprise Act 2002, s 23. 'Merger Assessment Guidelines' (CMA, September 2010) paras 3.3.1 and 3.3.3.
[659] Enterprise Act 2002, ss 22(1)(b) and 33(1)(b).

competitive pressure on firms to improve their offer to customers or become more efficient or innovative."[660]

5.3.1.1 Review of turnover-based thresholds for EU merger notifications

The turnover-based jurisdictional threshold for the review of mergers in the UK is satisfied where the annual UK turnover of the acquired enterprise exceeds £70million.[661] Turnover is also relevant in determining whether a concentration has a Community dimension for the purposes of the EU Merger Regulation.[662] However, debate on the appropriateness of turnover-based thresholds for merger notifications is gathering pace. At the EU level, there is additional concern about whether turnover-based thresholds capture all transactions that may have an effect on competition in the Internal market.[663] The turnover-based thresholds in the EU Merger Regulation are subject to review under the European Commission's consultation on procedural and jurisdictional aspects of EU merger control.[664]

Debate on the utility of turnover-based jurisdictional thresholds is especially pertinent in the digital economy. Acquisition targets that are emerging firms may not as yet generate substantial turnover, but may nevertheless be highly valued and represent a potentially important competitive force.[665] This was evident from Facebook's acquisition of WhatsApp in 2014.[666] WhatsApp's turnover was not sufficient for the acquisition to constitute a concentration with a Community dimension. Nevertheless, Facebook paid US€19billion for WhatsApp, which indicated the significant future value that Facebook expected to realise from the acquisition. The acquisition was ultimately

[660] CMA Merger Assessment Guidelines (n 658) para 3.3.1.
[661] ibid para 4.1.3.
[662] EU Merger Regulation (n 33) art 1.
[663] 'Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control: Consultation Document' (European Commission, 7 October 2016) 20.
[664] ibid 18-26.
[665] ibid 3.
[666] *Facebook/WhatsApp* (n 58).

reviewed by the European Commission after Facebook requested a "one-stop-shop" review to avoid notifying multiple jurisdictions with different requirements.[667] However, this case demonstrates how turnover is not always the deciding factor that makes a target an attractive merger partner.

Where the key factors are rather the target's assets and/or ability to innovate,[668] reliance on a turnover-based threshold may prevent some transactions from being reviewed. One option is to incorporate a transaction value-based threshold. This takes into account the high price that firms can be willing to pay based on an assessment of the future value of the assets of target firms (regardless of current turnover). A shift in this direction is evident from the introduction of such a test as part of the ninth amendment to the German Act against Restraints of Competition, which came into effect on 9 June 2017.

Under the new threshold, a transaction will require clearance if: (i) the transaction value exceeds EU€400million; and (ii) the target has significant business activities in Germany.[669] The requirement that the target has significant business activities in Germany has the potential to ensure that the transaction value-based threshold is not drawn too widely. The European Commission has consulted on a similar approach.[670] However, given the difficulties in ascertaining that this requirement is satisfied where the target is an emerging firm, the requirement should arguably apply to both target and acquiring firms (as previously considered in Germany).

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[667] EU Merger Regulation (n 33) art 4(5).

[668] European Competition Commissioner Margrethe Vestager, 'Refining the EU Merger Control System' (Speech at the Studienvereinigung Kartellrecht, Brussels, 10 March 2016) <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en> accessed 2 May 2017.

[669] The new threshold applies in addition to the existing turnover-based thresholds under which: (i) both parties must have a combined worldwide revenue of more than EU€500million; (ii) one party must have German revenues of more than EU€25million; and (iii) another party to the transaction must have German revenues of more than EU€5million. Act against Restraints of Competition, s 35.

[670] European Commission (n 663).

Transaction value-based thresholds should target mergers that ought to be reviewed, without unduly increasing the regulatory burdens for emerging firms or deterring efficiency-enhancing consolidations. This will depend, amongst other things, on the size of the economy of the individual country. In turn, this will be influenced by the scope for direct and indirect network effects, economies of scale, and the possibilities for multi-homing and switching in the relevant industry. The threshold should also be subject to regular review to account for the rapid rate of technological development in the digital economy.

The introduction of a transaction-value based threshold at the EU level could have implications for merger regulation in the UK come March 2019 if, for instance, the UK joins the European Economic Area ("EEA") because the EEA Agreement replicates the substantive EU competition rules.[671] If the UK does not join the EEA, merging parties may need to make multiple notifications for transactions that satisfy the jurisdictional thresholds in the UK and the EU. The commercial uncertainty that would arise from the risk of conflicting decisions at the UK and EU levels renders this an area in need of serious consideration, in order to protect the investment incentives on which the future development of digital markets in the UK depends.

5.3.2 Intervention in merger situations under Section 42 of the EA2002

The Secretary of State may issue an Intervention Notice under Section 42(2) of the EA2002 if "he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation".[672] Once an Intervention Notice has been issued,

[671] Agreement on the European Economic Area OJ L(1994)1, pt IV, ch 1.

[672] A Special Intervention Notice may be issued under Section 59(2) of the Enterprise Act 2002 if the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a special merger situation has been or will be created. A "special merger situation" may arise in relation to the provision of broadcasting of any description, where at least 25 per cent of all broadcasting of that description provided in the UK was provided by the person(s) by whom one of the enterprises concerned was carried on. Assessment of the merger situation will then be limited to the public

Ofcom has a duty to advise on any media public interest aspects of the transaction.[673] Meanwhile, the CMA must investigate and report on any relevant competition issues.[674] In deciding whether to make an adverse public interest finding in relation to a relevant merger situation,[675] the Secretary of State is required to accept the decision of the CMA as to any anti-competitive outcome.[676] The relevant public interest considerations for broadcasting and cross-media mergers are set out in Section 58(2C) of the EA2002 (as inserted by Section 375 of the CA2003).

5.3.2.1 Merger interventions on the media plurality ground

The first consideration in Section 58(2C)(a) is the media plurality public interest consideration. This specifies the need in relation to every different audience in the UK, for there to be a "sufficient plurality of persons with control of the media enterprises serving that audience".[677] There is no legislative definition of "sufficient plurality of persons". However, the Explanatory Notes to Section 375 of the CA2003 state that Section 58(2C)(a) is "concerned primarily with ensuring that ownership of media enterprises is not overly concentrated in the hands of a limited number of persons."[678] This is said to encompass the need for a diversity of viewpoints, in terms of a sufficient number of views being expressed, but also "variety in those views and for there to be a variety of outlets and publications in which they can be expressed."[679]

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interest. Enterprise Act 2002, ss 59(3D) and 59A (as inserted by Section 378(1) of the Communications Act 2003).

[673] Enterprise Act 2002, s 44A.

[674] ibid s 44.

[675] ibid s 54(2).

[676] ibid s 54(7)(a).

[677] The other media public interest considerations include: (b) the need for a wide range of broadcasting throughout the UK which is of high quality, and calculated to appeal to a wide variety of tastes and interests; and (c) the need for persons in control of and carrying on media enterprises to have a genuine commitment to attaining the standards objectives set out in Section 319 of the Communications Act 2003.

[678] Explanatory Notes to the Communications Act 2003, para 802.

[679] 'Guidance on the Operation of the Public Interest Merger Provisions relating to Newspaper and Other Media Mergers' (Department of Trade and Industry, May 2004) para 5.11

In ascertaining whether there is likely to be a significant reduction in plurality, the Secretary of State therefore considers not simply the number of media enterprises but also the relative audience shares of the media enterprises.[680] Whilst the public interest considerations in Section 58(2C) of the EA2002 elaborate somewhat on the meaning of the public interest in media plurality, there is considerable discretion in the assessment of the sufficiency of plurality. Uncertainty as to the criteria for intervening on media public interest grounds can undermine the legitimacy of such interventions, particularly when the circumstances of a case suggest that such an intervention appears to be at odds with market forces. This is exemplified by the circumstances surrounding the first Intervention Notice to be issued under Section 58(2C)(a), relating to Sky's proposed acquisition of shares in ITV.

5.3.2.2 Sky's proposal to acquire a 17.9 per cent shareholding in ITV

On 26 February 2007, an Intervention Notice was issued in respect of the proposed acquisition by Sky of a 17.9 per cent shareholding in ITV.[681] Ofcom reported concerns that following the acquisition there might not be a sufficient plurality of persons with control of media enterprises serving the UK cross-media audience for national news or UK television audience for national news.[682] The OFT concluded that Sky could acquire material influence over ITV,[683] and this might substantially lessen competition in the television

<http://webarchive.nationalarchives.gov.uk/20100512170615/http://www.bis.gov.uk/files/file14331.pdf> accessed 13 August 2017.

[680] ibid paras 7.10-7.11.

[681] David Saunders, 'Intervention notice given pursuant to Section 42 Enterprise Act 2002', 26 February 2007 <http://webarchive.nationalarchives.gov.uk/20110120022640/http://www.bis.gov.uk/files/file38017.pdf> accessed 13 August 2017.

[682] 'Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc's acquisition of 17.9% shareholding in ITV plc' (Ofcom, 27 April 2007) para 5.1 <http://webarchive.nationalarchives.gov.uk/20110120022633/http://www.bis.gov.uk/files/file39607.pdf> accessed 13 August 2017.

[683] 'Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc: Report to the Secretary of State for Trade and Industry' (OFT, 27 April 2007) para 5

market as a whole.[684] It referred to the guidance notes of the then Department of Trade and Industry on the public interest in newspaper and other media mergers.[685] These notes state that the analytical framework for predicting post-merger effects is to compare the predicated post-merger competitive outcome with the outcome absent the merger.[686] The best proxy for the counterfactual is said to be prevailing competitive conditions on the basis that these are observable and subject to verification from multiple sources.[687] Also taken into account are likely and imminent changes in the structure of competition.[688]

The OFT relied on the counterfactual of an independent ITV.[689] In doing so, it referred to its finding in 2002 of Sky's dominant position in the supply of paid-for premium sport and movie content at the wholesale and retail levels in the UK.[690] However, changes in the structure of the market since this finding call into question the use of an independent ITV as the appropriate counterfactual. The most notable change is arguably the formation of Virgin Media in 2006, as Sky's proposal to acquire ITV appeared to be aimed at blocking a rival bid from Virgin Media. A more appropriate counterfactual could have been the acquisition of ITV by Virgin Media. The OFT did not consider Virgin Media's acquisition of ITV to be likely and imminent.[691] Nevertheless, it is arguable that there should have been greater consideration of the potentially countervailing impact of Virgin Media's presence in the market on the ability and incentive for Sky to exploit its market position in an anti-competitive manner.

<https://assets.publishing.service.gov.uk/media/555de3c940f0b669c40000d3/SkyITV.pdf> accessed 13 August 2017.

[684] ibid para 145.

[685] Department of Trade and Industry (n 679).

[686] ibid para 3.23.

[687] ibid para 3.24.

[688] ibid.

[689] OFT (n 683) para 103.

[690] ibid para 33.

[691] ibid para 100.

An arguably more constructive outcome of this case arises from the emphasis that the CC placed on adopting a qualitative approach to assessing the sufficiency of plurality of persons. The CC did not consider it necessary to take a view on precisely how many owners would constitute a sufficient level of plurality of persons. It instead looked qualitatively at sufficiency in terms of internal and external plurality.[692] The Secretary of State concluded that the transaction operated against the public interest on the basis of an adverse effect on competition.[693] Sky was consequently required to partially divest of its shareholding in ITV to below 7.5 per cent.[694]

On the facts of the case, the transaction was found to raise competition concerns. However, in the absence of such a finding, it is clear how tension could have arisen between regulating media mergers according to the principles of competitive markets and the public interest in media plurality. Resolving such tension would have been further complicated by the substantial degree of discretion that prevails in assessing the sufficiency of plurality of persons.

5.3.3 Issue of European Intervention Notices under Section 67 of the EA2002

As an exception to the EU's exclusive competency in relation to concentrations with a Community dimension, Article 21(4) of the EU Merger Regulation provides that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the EU Merger Regulation.[695] Plurality of the media is one of the three legitimate

[692] 'Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc' (Competition Commission, 20 December 2007) para 5.15 <http://webarchive.nationalarchives.gov.uk/20110120022628/http://www.bis.gov.uk/files/file43218.pdf> accessed 13 August 2017.

[693] 'Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc dated 29 January 2008' (Department for Business, Enterprise and Regulatory Affairs, 29 January 2008).

[694] ibid para 25.

[695] Such interests must still be compatible with the general principles and other provisions of Community law.

interests which are expressly referred to in Article 21(4).[696] This applies notwithstanding that the European Commission may find the transaction in question does not raise competition concerns. It therefore reflects recognition at the EU level that the broader importance of the media means that it may warrant regulatory protection at the national level, beyond that afforded by market forces and the enforcement of EU or domestic merger control rules.

The process for intervening on this basis in the UK is set out in Section 67(2) of the EA2002. This provides that the Secretary of State may issue a European Intervention Notice if "he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation".[697] The first European Intervention Notice to be issued on the basis of the legitimate interest of media plurality was issued on 4 November 2010, in relation to News Corporation's (subsequently abandoned) proposal to acquire Sky (then BSkyB).[698] The European Commission approved the transaction on competition grounds under the EU Merger Regulation.[699] However, this was without prejudice to investigation in the UK as to whether the transaction was compatible with the UK's interest in media plurality. The proposed acquisition by Twenty-First Century Fox of Sky, which is currently being considered by the Secretary of State/CMA, provides the opportunity to explore how much the market has changed since

[696] Public security and prudential rules are the other legitimate interests referred to in Section 21(4) of the EU Merger Regulation.
[697] Once a European Intervention Notice has been issued, the CMA and Ofcom must investigate and report in accordance with Articles 4 and 4A of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003, respectively.
[698] Andrew Rees, 'European intervention notice given pursuant to Section 67 Enterprise Act 2002 – anticipated acquisition of British Sky Broadcasting plc by News Corporation', 4 November 2010 <http://old.culture.gov.uk/images/publications/bskyb-intervention-notice-nov-2010.pdf> accessed 24 July 2017.
[699] 'Commission clears News Corp's proposed acquisition of BSkyB under EU merger rules' (European Commission press release IP/10/1767, 21 December 2010) <http://europa.eu/rapid/press-release_IP-10-1767_en.htm> accessed 13 August 2017.

2010, and whether the prevailing regulatory framework permits due consideration of such change.

5.3.3.1 News Corporation's proposal in 2010 to acquire BSkyB

On the pluralism point, Ofcom concluded that News Corporation's proposed acquisition of BSkyB (hereafter referred to as Sky) could be expected to operate against the public interest.[700] It considered that there might not be a sufficient plurality of persons with control of media enterprises providing news and current affairs to UK-wide, cross-media audiences.[701] Notably, sports news was expressly excluded from Ofcom's definition of news and current affairs.[702] After News Corporation proposed undertakings to guarantee the independence of Sky's 24-hour news channel, Ofcom conceded on the plurality point.[703]

As already noted, News Corporation was obliged to withdraw its bid at the height of the phone hacking scandal surrounding the News of the World.[704] It is likely that the merger would otherwise have been allowed to proceed. In addition to highlighting how competition law does not necessarily address concerns about media plurality, it is arguable that this case demonstrates the limitations of the UK's legal safeguards for preserving media pluralism.[705] Exposure of the prevalence of unethical journalistic practices within the British press led to the public inquiry chaired by Lord Justice Leveson. The

[700] 'Report on Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group plc by News Corporation' (Ofcom, 31 December 2010) para 7.1 <https://www.ofcom.org.uk/__data/assets/pdf_file/0017/81413/public-interest-test-report.pdf> accessed 13 August 2017.
[701] ibid.
[702] ibid para 3.7.
[703] Letter from Ofcom to the Rt Hon Jeremy Hunt (then Secretary of State for Culture, Olympics, Media and Sport) 22 June 2011 <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/78421/uils-further-advice.pdf> accessed 4 April 2017.
[704] 'News Corp withdraws bid for BSkyB' *BBC News* (13 July 2011) <http://www.bbc.co.uk/news/business-14142307> accessed 13 August 2017.
[705] Paul Smith, 'Too Much or Not Enough: Competition Law and Television Broadcasting Regulation in the United Kingdom' (2013) 9(3) *Westminster Papers* 143, 153.

terms of reference for Part 1 of the Inquiry included to make recommendations "for a new more effective policy and regulatory regime which supports […] the plurality of the media".[706] The report for Part 1 of the Inquiry, which was published on 29 November 2012, acknowledges the need for a more pluralistic press.[707] However, it deferred to the UK Government and Parliament on the specifics of media pluralism, including the meaning of "sufficiency of plurality".[708]

Ofcom's conclusions relating to News Corporation's proposed acquisition of Sky were based on the finding that, despite the development of the Internet, traditional broadcast television (more specifically, the BBC) remains dominant in the consumption of news.[709] The BBC was found to account for the largest proportion of news minutes consumed per head per day by platform and provider at 43.5 per cent, compared to 23.7 per cent for a combined News Corporation and Sky.[710] Also, the consumption of news online was found to be consumed largely via the websites of traditional broadcasters. Traditional broadcasters (including the online services of the same) remain overall the most popular source for news consumption in the UK, with the BBC retaining a weekly reach of 66 per cent across television and radio, and 51 per cent online.[711] Also, 70 per cent of the BBC's online users say that BBC News is their main source of online news.[712]

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[706] Leveson Inquiry, 'Terms of Reference: Part 1', para 2(a) <http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/about/terms-of-reference/> accessed 14 October 2016.
[707] Report of the Leveson Inquiry (n 633).
[708] 'Measurement Framework for Media Plurality' (Ofcom, 5 November 2015) para 2.9 <https://www.ofcom.org.uk/__data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf> accessed 14 October 2016.
[709] Ofcom (n 700) para 5.28.
[710] ibid 59.
[711] Richard Fletcher, David AL Levy, Nic Newman and Rasmus Kleis Nielsen, 'Reuters Institute Digital News Report 2016' (University of Oxford Reuters Institute for the Study of Journalism, undated) 34 <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital-News-Report-2016.pdf> accessed 13 August 2017.
[712] ibid.

However, there is increasing demand for online news, especially from alternative sources. This is supported by the strategic decision of *The Independent* in 2016 to close its print operations and to embrace an online-only future.[713] This decision is made in the midst of the rise of social media (like Facebook and Twitter) and digital publishers that often focus more on issues that receive less (if any) coverage by traditional broadcast media. This makes it increasingly difficult for print publishers to attract and monetise readers.[714] This trend is driven by the consumption preferences of millenials, for whom social media has overtaken traditional broadcast television as their main source of news.[715] As noted in the previous chapter, there is also the issue of multi-homing by viewers. In the light of such developments, it is important that sufficient emphasis is placed on dynamic analysis in the ongoing assessment of the proposed acquisition by Twenty-First Century Fox of the remaining shares in Sky.

5.3.3.2 Twenty-First Century Fox's proposal to acquire the remaining shares in Sky

In April 2017, the European Commission unconditionally approved the proposal by Twenty-First Century Fox to purchase the remaining shares in Sky that it does not already own.[716] It found that Twenty-First Century Fox and Sky are mainly active in different markets in the relevant Member States (Austria, Germany, Ireland, Italy and the UK). The parties were found to compete with one another only to a limited extent, mainly in the acquisition of television content and the wholesale supply of basic pay-TV channels.[717]

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[713] 'The Independent becomes the first national newspaper to embrace a global, digital-only future' *The Independent* (12 February 2016) <http://www.independent.co.uk/news/media/press/the-independent-becomes-the-first-national-newspaper-to-embrace-a-global-digital-only-future-a6869736.html> accessed 13 August 2017.

[714] Mark Sweney, 'Facebook's rise as news source hits publishers' revenues' *The Guardian* (15 June 2016) <https://www.theguardian.com/media/2016/jun/15/facebooks-news-publishers-reuters-institute-for-the-study-of-journalism> accessed 13 August 2017.

[715] 'Social media "outstrips TV" as news source for young people' *BBC News* (15 June 2016) <http://www.bbc.co.uk/news/uk-36528256> accessed 13 August 2017.

[716] n 74.

[717] ibid.

The European Commission concluded that the transaction was therefore likely to lead to only a limited increase in Sky's share of these markets.[718]

The European Commission's decision is without prejudice to the European Intervention Notice that was issued in the UK on 16 March 2017.[719] In lieu of a reference to the CMA for a Phase 2 investigation, Twenty-First Century Fox and Sky proposed undertakings (which are discussed below).[720] Secretary of State Karen Bradley stated she was minded-not-to accept such undertakings and was instead minded-to refer the proposed acquisition on media plurality grounds.[721] This thesis welcomes the recent findings of the CMA and Ofcom (to the extent that Ofcom supports such a referral).[722] It takes issue, however, with some points made in Ofcom's report on the basis that, rather than resolve questions about media plurality, developments in the supply and consumption of audio-visual content arguably raise additional questions.

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[718] ibid.

[719] This intervention is made on the grounds of media plurality and genuine commitment to broadcasting standards under Sections 58(2C)(a) and 58(2C)(c) of the Enterprise Act 2002, respectively. The focus here is on the implications of Sky's growth as an internet service provider on media plurality in the UK. 'European Intervention Notice given pursuant to Section 67 Enterprise Act 2002: Anticipated Acquisition of Sky plc by Twenty-First Century Fox, Inc.' (Rt Hon Karen Bradley MP, Secretary of State for Culture, Media and Sport, 16 March 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/600344/European_Intervention_Notice_Sky_Fox__16_March_2017.pdf> accessed 5 April 2017.

[720] 'Undertakings in Lieu given by 21st Century Fox, Inc. pursuant to para.3 of Schedule 2 of Enterprise Act (Protection of Legitimate Interests) Order 2003 provided to the Secretary of State' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623772/21CF_Sky_undertakings_to_the_Secretary_of_State__1_.pdf> accessed 31 July 2017.

[721] 'Statement outlining the Secretary of State's decision on the proposed takeover of Sky plc by 21st Century Fox, Inc.' <https://www.gov.uk/government/speeches/skyfox-merger> accessed 24 July 2017. The Secretary of State has since confirmed her intention to make a referral to the CMA on the grounds of media plurality ground and genuine commitment to broadcasting standards. Statement from the Culture Secretary (n 75).

[722] 'Public interest test for the proposed acquisition of Sky plc by 21st Century Fox, Inc: Ofcom's report to the Secretary of State' (Ofcom, 20 June 2017) <https://www.ofcom.org.uk/__data/assets/pdf_file/0012/103620/public-interest-test-report.pdf> accessed 13 August 2017; 'A report to the Secretary of State for Culture, Media and Sport in response to the European intervention notice issued on 16 March 2017 in relation to the anticipated acquisition by Twenty-First Century Fox, Inc of Sky PLC' (CMA, 20 June 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/623569/170620_CF_Sky_-_CMA_report_Redacted.pdf> accessed 13 August 2017.

Ofcom considers that the proposed transaction raises public interest concerns about the risk of increased influence of the Murdoch Family Trust over the UK news agenda and political process.[723] This is a legitimate concern, given the scale of the merged entity, and its reach across print, radio, television and online. It is understood that the Murdoch Family Trust would become the third biggest provider of news in the UK (behind only the BBC and Independent Television News).[724] Yet Ofcom considers that the proposed undertakings in lieu would prevent, remedy or mitigate any adverse effects on media plurality.[725] It is suggested here, however, that the proposed remedies appear inadequate in their current form. This reinforces questions about Ofcom's role, albeit advisory, under the prevailing regulatory framework (in a media system that was ultimately not cleared by Leveson as being fit for purpose).

The proposed remedies are behavioural in nature. They include commitments to maintain and ring-fence funding for a Sky-branded news service for a 5-year period, and to have a separate editorial board for Sky News. News Corp claims the rise in online news (e.g. Facebook and Huffington Post) has diluted its power over the supply of news in the UK. However, Ofcom found the opposite, namely that News Corp's most popular title, *The Sun*, continues to grow and remains the most widely read daily printed newspaper in Great Britain.[726] With 70 per cent of Internet users in the UK consuming news online via *The Sun* or Sky News, following the transaction the Murdoch Family Trust would have material influence over news providers, with a combined reach second only to that of the BBC.[727]

[723] Ofcom (n 722) 4.
[724] ibid para 1.5.
[725] ibid 6.
[726] ibid paras 6.1.4 and 6.15.
[727] ibid para 2.10.4.

The 5-year period of the proposed commitments is notably half the 10-year period that News Corporation proffered in relation to its proposed acquisition of Sky in 2010. After the expiry of the 5-year period, News Corp could retain such a service but the funding would not need to be ring-fenced. This could undermine the independence and/or quality of the Sky News service. The extent to which the proposed commitments would ensure the independence of the proposed board is also questionable. For instance, the board members would be selected by the Nominating and Corporate Governance Committee of the board of Twenty-First Century Fox,[728] and the board would have obligations to report to the board of Twenty-First Century Fox.[729] Given general concerns about the monitoring and enforcement of behavioural remedies, the focus should arguably be on securing structural remedies, including the formation of a separate company for Sky News (as required by Ofcom in relation to News Corporation's proposed acquisition of Sky in 2010).

The main question remains as it stood at the time of News Corporation's proposed acquisition of Sky, that is whether a Fox-owned Sky News would give the Murdoch Family Trust excessive influence over UK news and the political agenda when combined with its other media operations. Additional considerations that have arisen since News Corporation's proposed acquisition of Sky include questions about the impartiality of Fox News (the US cable and satellite television news channel owned by the Fox Entertainment Group (which is a subsidiary of Twenty-First Century Fox)), and the increased role of the Internet in the supply and consumption of news. The increasing supply and consumption of news online reinforces questions about the meaning of the public interest in media plurality, such as the definition and measurement of "control", and the impact of online news sources on viewer "choice". There is the question of whether more attention should be

[728] n 720, para 4.1(i).
[729] ibid para 4.1(iv).

paid to the distinction between the production and distribution of news, given that online and social media platforms (like Google, Facebook and Twitter) do not produce news items as such, but rather provide a platform to direct viewers to news items produced by others. Little is known about the extent to which this may be improving the options open to viewers in their capacity as consumers or citizens.

Following Sky's acquisition of Telefónica UK's O2 and BE broadband (which was part of O2) and fixed-line telephony business in 2013,[730] Sky has positioned itself well to be able to supply broadband as a standalone service or as part of a bundle of services including pay-TV. Ofcom reports that, as at the end of 2015, Sky served almost one quarter of the UK's home fixed broadband market, with a 23 per cent market share.[731] Sky is also active in the mobile market following its launch of Sky Mobile in November 2016. Sky Mobile focuses on offering data plans for high quality streaming and downloads, allowing customers to "roll over" unused data for up to three years.[732] This reflects the increasing dependence of viewers on Internet access in the consumption of audio-visual content. The resulting impact on the relative position of Sky as a gatekeeper for access to content (particularly sports news and movies) should be a chief consideration in reviewing the likely effects of the proposed acquisition on the broader media landscape.

[730] This acquisition was announced a month after the announcement of BT's acquisition of EE. 'Sky to Acquire Telefónica UK's Broadband and Fixed-Line Telephony Business' (O2 news, 1 March 2013) <http://news.o2.co.uk/?press-release=sky-to-acquire-telefonica-uks-broadband-and-fixed-line-telephony-business> accessed 3 May 2017.

[731] 'Ofcom Facts & Figures 2016' <https://www.ofcom.org.uk/__data/assets/pdf_file/0021/12828/facts-figures-table16.pdf> accessed 3 May 2017.

[732] Andrew Griffin, 'Sky Mobile launches, hoping to fix everything wrong with phone contracts' *The Independent* (29 November 2016) <http://www.independent.co.uk/life-style/gadgets-and-tech/news/sky-mobile-launch-phone-network-date-price-tariff-offers-best-deal-data-a7446211.html> accessed 13 August 2017.

The acquisition of Sky by Twenty-First Century Fox would see the UK's largest pay-TV provider fully controlled by a US firm. It would enable a single person (i.e. the Murdoch Family Trust) to secure control of Sky News and pay-TV operations in the UK. Its UK news media outlets already include *The Times*, *The Sunday Times* and *The Sun*, as well as radio group TalkSport (which it controls through News Corp). It has been suggested elsewhere that, given News Corp's continuing domination of newspaper circulation, further expansion of its power should be a cause for concern.[733] In view of the increasing consumption of news online and Sky's growth as an internet service provider, it is suggested here that such concerns merit serious consideration.

Bundling raises further issues here, particularly in relation to sports coverage. The proposed transaction could strengthen the ability of Sky, Twenty-First Century Fox and/or News Corp to bundle content and services. As already noted, Ofcom's prevailing approach to the definition of news and current affairs is to exclude sports news. One consequence of this is that the impact of sports coverage on the ability to attract and retain audiences is likely to be under-estimated.[734] This reinforces the case for extending the category of news and current affairs to include sports news.

In addition, as owner of the Fox Entertainment Group, Twenty-First Century Fox has control over the broadcast rights to a large amount of premium movies. It may be able to exploit such control in negotiations with services that depend on Sky's carriage to almost a quarter of UK households. This could restrict the relative ability of other movie distributors to access viewers, with possible adverse effects on media plurality and/or content diversity.

[733] Steven Barnett, Martin Moore and Damian Tambini, 'Media plurality, the Fox-Sky bid, and the case for referral to Ofcom' (London School of Economics Media Policy Project media policy brief no.18, March 2017) 14 <http://blogs.lse.ac.uk/mediapolicyproject/files/2013/09/LSE-MPP-Policy-Brief-18-Media-Plurality.pdf> accessed 13 August 2017.
[734] Ofcom (n 722) para A2.94.

There is also the possibility that this could stifle innovation and the future development of online media services in the UK.

This is another area that requires particular attention in the light of Brexit. Exceptions to the principle of net neutrality, for example, are strictly regulated at the EU level.[735] It remains to be seen what rules in this area may apply in the UK from March 2019. Brexit may require the UK to set out its own net neutrality guidance. This is likely to be informed by the EU approach. However, there could be the opportunity to address some loopholes, such as whether zero-rating (where providers offer services at a rate of £0) is allowed.

5.4 Media Ownership and Merger Regulation in Australia

Media mergers in Australia are subject to media-specific ownership rules in the BSA and potential scrutiny under the standard merger regime in the CCA. In contrast to the UK merger regime, there is no provision for intervening in media mergers on public interest grounds. The introduction of a media-specific public interest test in Australia was proposed over 15 years ago, as one of the proposals made by the Productivity Commission in its report on broadcasting.[736] More recently, it featured as a key recommendation of the Convergence Review.[737] As in the UK, fundamental questions about who should decide when a media market is excessively concentrated, and on what basis, arise in relation to the test proposed by the Convergence Review.[738] However, it will be suggested that a modified version of the UK test could serve as a model for Australia, and a media-specific public interest test could

[735] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1.

[736] 'Broadcasting' (Productivity Commission Inquiry Report, 3 March 2000) <http://www.pc.gov.au/inquiries/completed/broadcasting/report/broadcst.pdf> accessed 13 August 2017.

[737] Convergence Review Report (n 77) 18, 21.

[738] ibid.

be used to address concerns about local media ownership in place of retaining media ownership rules that have become technologically-obsolete.

5.4.1 Australian media ownership regulation under the BSA

A policy of media diversity is evident from the legislative objectives of the BSA, which refer to the availability of a diverse range of radio and television services offering entertainment, education and information, and diversity in the control of broadcasting services.[739] The rules on media ownership and control in the BSA do not directly apply to pay-TV, but they are pertinent because of their inherent impact on the structure of the broader media industry. The BSA made two major changes to the regulation of the ownership of television broadcasting in Australia. Firstly, media ownership was limited to one of the three regulated media platforms (print newspapers, radio and television) in a given market under the "one to a market" rule for commercial television broadcasting licences.[740] Secondly, the threshold restriction on a person controlling commercial television broadcasting licences serving more than 60 per cent of the population of Australia,[741] was increased to 75 per cent under what is now known as the "75 per cent reach" rule.[742] This previously replaced a restriction on a person from owning more than two stations. The effect of this was to separate television licences into metropolitan networks (Seven, Nine and Ten) and regional networks.

5.4.1.1 Broadcasting Services Amendment (Media Ownership) Act 2006

Following the Broadcasting Services Amendment (Media Ownership) Act 2006, the BSA allows cross-media mergers subject to the "2 out of 3" rule, the "one to a market" rule and the "5/4 minimum voices" rule.[743] The "2 out of

[739] Broadcasting Services Act 1992, s 3(1).
[740] ibid ss 53 and 55.
[741] Broadcasting (Ownership and Control) Act 1987, s 22.
[742] Broadcasting Services Act 1992, s 53(1).
[743] It also removed restrictions on the foreign control of commercial broadcasting licences and foreign directorships. Broadcasting Services Amendment (Media Ownership) Act 2006, sch 2, para 4 (repealing

3" rule prevents a person from controlling more than two out of three of the regulated media platforms in the same licence area.[744] This platform-based approach is in contrast to the deregulatory approach in the UK, where the national cross-media ownership rule imposes an absolute limit of 20 per cent on the ownership of national newspaper circulation and ITV licence.[745] The "one to a market" rule prevents a person from controlling more than one commercial television broadcasting licence in any given licence area.[746] The "5/4 minimum voices" rule imposes a minimum requirement of five independently-controlled media voices in metropolitan areas and four such voices in regional areas.[747]

Cross-media ownership in Australia is also subject to the prohibition on transactions that result in an "unacceptable 3-way control situation".[748] Such a situation arises when a person who wishes to acquire a new commercial radio broadcasting licence in any given licence area is also in a position to control: (i) a commercial television licence, where more than 50 per cent of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence; (ii) a second radio licence in the same licence area; or (iii) a newspaper associated with the same licence area.[749] Firms seeking to expand their media holdings are therefore restricted to one of the regulated media platforms. This may have contributed to domination of the Australian media by such a small number of large firms specialising in one of the three regulated media.[750]

Broadcasting Services Act 1992, pt 5, div 4). The media industry remains classified as a sensitive sector under Australia's foreign investment policy. Foreign Acquisitions and Takeovers Regulation 2015, s 55.

[744] This rule also provides for some additional local programming obligations for regional commercial television broadcasting licensees. Broadcasting Services Amendment (Media Ownership) Act 2006, ss 61AA and 61AEA.

[745] Communications Act 2003, sch 14, pt 1, para 1.

[746] Broadcasting Services Act 1992, ss 54 and 56.

[747] ibid ss 61AG and 61AB.

[748] ibid s 61AMA.

[749] ibid s 61AEA.

[750] Many of these firms have also developed cross-media interests in unaffected media like pay-TV and the Internet.

5.4.1.2 Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017

The Broadcasting Reform Bill proposes the repeal of the "75 per cent reach" rule and the "2 out of 3" rule.[751] It also proposes that commercial television broadcasting licensees should be required to broadcast a prescribed amount of local content each week to ensure diversity of content in regional Australia.[752] The Media Reform Bill was previously introduced in March 2016 but lapsed at prorogation. It was reintroduced as the Broadcasting Reform Bill into the House of Representatives on 1 September 2016 and is currently before the Senate.[753] Progression of the Bill is slow amidst concerns regarding the potential impact of the proposed repeal of the "75 per cent reach" and "2 out of 3" rules on media diversity in an already highly concentrated market.

It is arguable, however, that the utility of the "75 per cent reach" rule is currently undermined in any event by the programming links that exist between the metropolitan and regional networks under affiliation agreements. Under these agreements, viewers in regional Australia receive many of the same commercial television services as viewers in the metropolitan areas. Such agreements are admittedly a matter for commercial negotiation. As the media sector continues to evolve, there is no guarantee that such agreements will endure (at least not in their current form). Also, the adequacy of the services received in regional Australia under such arrangements remains disputed, together with the ongoing issue of coverage black spots in rural areas.[754] There is also the issue of the extent to which viewers in rural and regional areas are disadvantaged by Australia's digital

[751] Schedules 1 and 2.
[752] Schedule 3.
[753] The Broadcasting Reform Bill remains stalled in the Senate, being opposed by Labor, the Greens and much of the crossbench.
[754] Lucy Barbour, 'Dump media ownership restrictions to save those "suffering" with TV blackspots, Liberal MP says' *ABC News* (27 September 2015) <http://www.abc.net.au/news/2015-09-27/regional-australians-suffering-with-tv-blackspots/6806536> accessed 13 August 2017.

divide.[755] Nevertheless, these issues do not in themselves warrant the retention of the "75 per cent reach" rule.

The growth of online streaming means that metropolitan networks are delivering an increasing amount of content across Australia, including in regional areas. Since Seven's foray in 2015 into the live streaming of its three broadcast television channels (Seven, 7TWO and 7mate) across all delivery platforms and in all Seven-owned capital cities and regions, Nine and Ten have also been developing their online streaming services. Whether the availability of services online is regarded as substitutable for traditional broadcast television is another issue. As already suggested, this will not necessarily be the case with multi-homing, for instance, where the relevant concept may not be substitutability but rather complementarity.

The argument remains that the focus of the "75 per cent reach" rule and the "2 out of 3" rule on the scope of media ownership, rather than influence, is outdated. The proposed repeal of the two rules could provide opportunities for metropolitan and regional broadcasters to merge, and thereby strengthen their ability to compete against SVOD platforms operating on a global scale. Applying only to traditional broadcast media is also at odds with the identified trends in the growing significance of online streaming. In the event that the "2 out of 3" rule is retained, the loophole regarding online newspapers should at least be addressed. However, with the proposed repeal of the "75 per cent reach" rule and the "2 out of 3" rule, it would become even more paramount that Australia's approach to media merger regulation under the CCA is fit for purpose in a converged digital environment.

[755] Anna Vidot, 'Almost half of regional Australians report internet is "very poor", "inadequate": University of Canberra survey' *ABC News* (21 June 2016) <http://www.abc.net.au/news/rural/2016-06-21/almost-half-of-regional-australia-reports-internet-very-poor/7529734> accessed 13 August 2017. The issue of the digital divide is more complex than physical access to the Internet, depending on education and income, for example.

5.4.2 Regulation of media mergers in Australia under Section 50 of the CCA

As in other sectors, a media merger may be subject to regulation under Section 50 of the CCA if it can be demonstrated that the acquisition will have the effect or likely effect of substantially lessening competition in a market in Australia. This is irrespective of the size of the acquisition or whether it results in control of the acquired firm. A wide range of factors are taken into consideration when assessing whether and, if so, to what extent an acquisition will enable the acquiring firm to exercise increased influence over the acquired firm. This was evident from the ACCC's assessment in 2015/2016 of Foxtel's proposal to acquire a minority shareholding in Ten.[756]

5.4.2.1 Foxtel's proposal to acquire a minority shareholding in Ten

The ACCC considered whether the then anticipated acquisition(s) would enable Foxtel to exercise an increased degree of influence over Ten.[757] Amongst other things, it considered the significance of Foxtel's investment in Ten, Foxtel's right to appoint directors to Ten's board, and the composition of the rest of the board.[758] Particular concern was expressed about the advantage Ten would gain in relation to acquiring premium sport content, which might substantially lessen competition in the FTA television market or broader market for the supply of television viewing services.[759] It was also considered that the proposed acquisition(s) might reduce competition in the sale of advertising, and reduce or eliminate competition for advertising sales

[756] The proposed acquisition(s) provided for Foxtel to acquire up to a 15 per cent shareholding in Ten and for Ten to acquire a 24.99 per cent stake in Multi Channel Network (a supplier of advertising opportunities on subscription television channels). There was also an option for Ten to acquire a 10 per cent shareholding in Presto (the joint venture between Foxtel and Seven West Media).

[757] 'Foxtel Management Pty Ltd and Ten Network Holdings Ltd - proposed acquisitions' (ACCC Public Competition Assessment, 2 March 2016) <http://registers.accc.gov.au/content/index.phtml/itemId/1190276/fromItemId/751043> accessed 13 August 2017.

[758] ibid paras 50-51.

[759] 'Foxtel Management Pty Ltd and Ten Network Holdings Ltd proposed acquisitions' (ACCC Statement of Issues, 14 September 2015) para 5 <http://registers.accc.gov.au/content/index.phtml/itemId/1190276/fromItemId/751043> accessed 13 August 2017.

between Ten and Foxtel.[760] However, the ACCC concluded that the other FTA television networks, pay-TV providers and online streaming services would continue to have sufficient alternatives to allow them to obtain content to attract viewers.[761]

The ACCC's decision in this case does not appear overly controversial given the nature of the transaction and market conditions at that time. The proposed acquisition(s) involved minority interests between entities that would ultimately remain separate. However, there have been significant developments regarding the links between Ten and Foxtel, particularly since Ten recently entered into receivership.[762] Such developments arguably call for more careful consideration of current proposals for the takeover of Ten, from both a competition and media diversity perspective.

5.4.2.2 Takeover proposals in respect of Ten since it entered into receivership

It was recently reported that CBS has emerged as a potential bidder in the impending takeover of Ten.[763] Shortly prior to this, the ACCC reportedly confirmed that it would allow a 50-50 takeover of Ten by the special purpose vehicles of Lachlan Murdoch and Bruce Gordon.[764] In addition to being Ten's largest single shareholder, Bruce Gordon is also owner of regional

[760] ibid.
[761] ACCC (n 757) para 5.
[762] Max Mason, 'CBA to appoint Network Ten receiver' *The Australian Financial Review* (30 June 2017) <http://webcache.googleusercontent.com/search?q=cache:0IUAPwN1j3YJ:www.afr.com/business/media-and-marketing/tv/cba-to-appoint-network-ten-receiver-20170630-gx215x+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 11 August 2017.
[763] David Crowe and Rosie Lewis, 'CBS bid for Ten Network reignites call for media reform' *The Australian* (29 August 2017) <http://www.theaustralian.com.au/business/media/broadcast/cbs-bid-for-ten-network-reignites-call-for-media-reform/news-story/9940bbef41c384d2c1f00d3331578042> accessed 8 September 2017. Since this news emerged shortly prior to the printing of this thesis, the focus here is on the proposed takeover of Ten by the special purpose vehicles of Lachlan Murdoch and Bruce Gordon.
[764] Max Mason, 'ACCC will allow Network Ten takeover by Lachlan Murdoch, Bruce Gordon' *The Australian Financial Review* (24 August 2017) <http://webcache.googleusercontent.com/search?q=cache:UQ63EMXnLNoJ:www.afr.com/business/media-and-marketing/tv/accc-will-allow-network-ten-takeover-by-lachlan-murdoch-bruce-gordon-20170823-gy2uvz+&cd=7&hl=en&ct=clnk&gl=uk&client=safari> accessed 26 August 2017.

broadcaster WIN Corporation and affiliate partner of Ten. Whilst the proposed transaction would be expected to reduce media diversity in Australia, it is reported that the ACCC does not consider that it would lead to a substantial lessening of competition.[765]

The takeover of Ten by Lachlan Murdoch and Bruce Gordon would be prohibited by the "2 out of 3" and "75 per cent reach" rules, hence the proposed takeover through special purpose vehicles. Nevertheless, the proposed takeover arguably raises serious concerns about media diversity and the implications for the role of FTA television in this regard. This does not in itself outweigh the case for repealing the "75 per cent reach" and "2 out of 3" rules. It is instead contended that this supports the case for the introduction of a media-specific public interest test in Australia. This could be used to address concerns about the proposed transaction, subject to further clarification regarding the ACCC's approach in applying Section 50 of the CCA to media mergers (particularly media mergers involving premium pay-TV).

In determining whether a merger or acquisition will have the effect or likely effect of substantially lessening competition in a market in Australia, the matters listed in Section 50(3) of the CCA must be taken into account. This includes barriers to entry, the availability of substitutes, the dynamic characteristics of the market (including growth, innovation and product differentiation), the likelihood that the acquisition would result in the removal of a vigorous and effective competitor, and the nature and extent of vertical integration in the market. Prohibition is subject to the possibility of the parties obtaining clearance from the ACCC, provided that it does not believe the merger will substantially lessen competition.[766] Authorisation may be granted

[765] ibid.
[766] Competition and Consumer Act 2010, ss 95AC and 95AN(1).

by the ACT where it can be demonstrated the merger will result or be likely to result in such a benefit to the public that it should be allowed.[767]

"Public benefit" was broadly interpreted by the ACT in *QCMA* to encompass "anything of value to the community generally",[768] including the economic goals of efficiency and progress.[769] In theory, this broad interpretation allows the possibility for merging parties to claim a wide variety of possible justifications.[770] However, the ACT stressed that this will be limited by the requirements that the public benefit is the result or likely result of the merger, that it is not otherwise available and that it is substantial.[771] Substantiality is assessed by reference to notions of what is achievable, taking into account the size and significance of the merger, and the markets under consideration.[772]

The significance of findings on the markets under consideration is demonstrated in relation to the proposed takeover of Ten. The ACCC's relative ambivalence towards the proposed takeover may be due, at least in part, to the fact that WIN Corporation and Ten are broadcast within different geographic areas i.e. regional and metropolitan areas, respectively. However, this does not take into consideration the consolidation of metropolitan and regional networks that would be likely to follow the repeal of the "75 per cent reach" and "2 out of 3" rules. It also arguably relies on an overly simplistic vision of broadcasting that does not consider the effects of media globalisation on the supply and consumption of content by viewers in metropolitan and regional areas.

[767] ibid ss 95AT and 95AZH(1)-(2).
[768] *QCMA* (n 34) [17,243].
[769] ibid.
[770] Robert J Glance, 'Merging Down Under: A Comparative Analysis of Australian and United States Merger Guidelines' (1995) 28(2) *Cornell International Law Journal* 501, 521.
[771] *QCMA* (n 34) [17,243].
[772] ibid [17,244].

In confirming that it would allow the proposed takeover of Ten by the special purpose vehicles of Lachlan Murdoch and Bruce Gordon, the ACCC says that the parties and associated parties will remain subject to general competition law.[773] At the same time, the ACCC considers that the proposed transaction does not meet the requirements for regulation under Section 50 of the CCA.[774] This raises questions about whether the existing approach to media merger regulation under Section 50 is fit for purpose and support the case for introducing a media-specific public interest test. The ACCC's draft Media Merger Guidelines arguably represent an important opportunity to provide further clarification in this regard.[775]

5.4.3 Proposals to introduce a media-specific public interest test in Australia

A modified version of the UK public interest test in the EA2002 could serve as a model for the introduction of a media-specific public interest test in Australia. As previously recommended by the Productivity Commission,[776] such a test should apply to all media mergers (as in the UK where the media public interest considerations apply). This is in contrast to the proposal of the Convergence Review that a public interest test should apply only in relation to changes in control of content service enterprises of national significance.[777] Adopting the concept of "changes in control of content service enterprises of national significance" would introduce unnecessary uncertainty as regards the substantial degree of discretion that would be conferred on the communications regulator that the Convergence Review recommended should be established to administer its proposed test. However, the scope of the UK test would also require further consideration if it is to form the basis for the introduction of such a test in Australia.

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[773] Michael Janda and David Chau, 'Ten takeover by Lachlan Murdoch and Bruce Gordon gets ACCC green light' *ABC News* (24 August 2017) <http://www.abc.net.au/news/2017-08-24/ten-takeover-by-murdoch-gordon-gets-accc-green-light/8837964> accessed 26 August 2017.
[774] ibid.
[775] ACCC Draft Media Merger Guidelines (n 90).
[776] Productivity Commission Inquiry Report (n 736) 38.
[777] Convergence Review Report (n 77) 18.

5.4.3.1 Scope of the recommended public interest test for Australia

Introduced in the pre-convergence era, the UK test applies to traditional broadcast media. It applies in respect of "media enterprises" which are defined as enterprises that consist in or involve broadcasting.[778] "Broadcasting" means the provision of services that must be licensed under Parts 1 or 3 of the Broadcasting Act 1990, or under Parts 1 or 2 of the Broadcasting Act 1996.[779] Any extension of the UK test (or any such test that may be introduced in Australia) to online streaming would be inconsistent in one respect with the underlying argument in this thesis that there is a reduced role for sector-specific regulation in the digital era. However, as regards the impact of sector-specific regulation on the structure of the market, it is important that regulatory frameworks apply in a technologically-neutral manner to all available distribution platforms.

5.4.3.2 Administration of an Australian media-specific public interest test

As regards the administration of the proposed public interest test, it is suggested that the advisory role that Ofcom fulfils in relation to the UK test is important. It has been seen how the UK test only applies if the Secretary of State intervenes in a media merger, which then requires Ofcom to advise on whether the merger is in the public interest. However, the Secretary of State is not bound to follow the advice of Ofcom. It is suggested that, from an institutional and procedural perspective, the introduction of a media-specific public interest test in Australia would reinforce the case for returning to having a separate industry-specific regulator for the communications sector. This would be along the lines of the institutional arrangement with Ofcom in the UK, with an exception in respect of general competition law enforcement which falls within the remit of the ACCC,[780] and the appointment of an ACCC

[778] Enterprise Act 2002, s 58A(1).
[779] ibid s 44(9)(a).
[780] n 128, 10.

Commissioner with primary responsibility for communications functions in the CCA.

As noted in Chapter 1, Australia has a history of separate regulators, with the ACCC established in 1995 upon the recommendation of the Hilmer Review (through the amalgamation of the Australian Trade Practices Commission and the Prices Surveillance Authority). The Hilmer Review considered that adopting an integrated approach under a single, economy-wide body was necessary at that time to advance the reform of Australian competition policy at the national level.[781] The ACCC is an independent statutory authority and economy-wide regulator. Within its organisational structure, it has a division for infrastructure regulation but not for communications regulation (whilst there is a separate division for the energy sector in the form of the Australian Energy Regulator). Under the current institutional arrangement, responsibilities are divided between the Department of Communications and the Arts, the Minister for this department, the Attorney-General's Department, ACMA and the ACCC.[782]

The recommendation here for an industry-specific regulator for the Australian communications sector is based on the general assumption that industry-specific regulators are better placed than generalist economy-wide regulators to deal with the technical and economic issues that arise in technology intensive and emerging markets. The relationship between competition authorities and industry regulators (which in turn depends on the interface between sectoral regulation and general competition law) remains

[781] Hilmer Report (n 36) 320-321.

[782] It has been suggested elsewhere that this has given rise to inconsistent decision-making. See, for example, 'Submission in response to the Department of Communications and the Arts Draft Report "Review of the Australian Communications and Media Authority"' (Optus, 17 June 2016) para 12 <https://www.communications.gov.au/sites/g/files/net301/f/submissions/acma-review--optus.pdf> accessed 16 August 2017.

contentious.[783] However, concerns about the impact of having an industry-specific communications regulator on the exercise of competition powers in Australia could be addressed through concurrency regulations of the kind that exist in the UK.[784] With the likely continuation in the increase of bundled services across the communications sector, and utility sector more broadly with the rise of the multi-utility firm,[785] maintaining effective concurrency regulations will become increasingly important in any event.

5.5 Local Media Ownership Rules in a Global Communications Sector

It is arguable that, in the digital era, the very notion of local and even national media ownership rules has become redundant and unworkable. The ability of viewers to access content from all over the World via the Internet is likely to undermine, to some extent, the ability of a single firm to control the supply of content in any given region or territory. To the extent that this remains possible, there is the decreasing relevance of territorial borders with respect to the ways in which audio-visual content is supplied and consumed. This calls into question the ability of a national government to enforce media-specific ownership rules that, as seen within the UK and Australian contexts, are typically geographically confined to the national or local level. As the European Council notes, with the global nature of the Internet, it is not possible to contain rules on media plurality within geographically-defined boundaries.[786]

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[783] See, Maher M Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70(1) *Cambridge Law Journal* 113.

[784] Competition Act 1998 (Concurrency) Regulations 2014; 'Memorandum of understanding between the Competition and Markets Authority and the Office of Communications – concurrent competition powers' (8 February 2016).

[785] See, for example, Jillian Ambrose, 'First Utility enters the broadband market by undercutting the Big Four' *The Telegraph* (24 July 2017) <http://www.telegraph.co.uk/business/2017/07/24/first-utility-enters-broadband-market-undercutting-big-four/> accessed 8 September 2017.

[786] Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment [2014] OJ C32/6, para 10.

Media-specific ownership rules are also largely still based on the number of owners of traditional broadcast media platforms and the unproven assumption that a particular number of owners is optimal for ensuring diversity of content. This fails to reflect the increasing prevalence of cross-media ownership involving non-traditional broadcast media platforms. With local media interests held by firms that also have interests in other forms of media on a national or international scale. Difficulty lies in ascertaining how to legitimately separate such interests in enforcing (local) media ownership rules.

Particular issues arise at the local level where, in an era of content abundance, local content production remains a legitimate area for regulatory concern. In fact, in a global society, the issue of protecting/promoting local content production is arguably increasingly important. As international content suppliers provide increasing amounts of content in formats aimed at a multicultural or transcultural audience, local content becomes potentially more important in defining the national and cultural interests of audiences in individual countries, and hence their place in a global society. However, this is not necessarily best achieved by media-specific ownership rules, given the direct impact of such rules on market structure. As already indicated, there are other means of protecting/promoting local content, such as through the public service mandates of public service broadcasters and the licence conditions imposed on broadcasters under national licensing regimes.

The liberalisation of local media ownership rules in the UK is therefore regarded as apt. By the Media Ownership (Radio and Cross-Media) Order 2011, the UK Government removed remaining restrictions on media ownership at the local level. This followed the recommendation of Ofcom, influenced by the perceived need to allow firms greater flexibility to

consolidate and establish themselves as multi-media corporations.[787] However, the issue of liberalising local media ownership rules is not straightforward (including in the UK given the devolved nations and North/South divide). The geographic size of Australia, with its dispersed population (albeit concentrated capital cities on the East coast) inherently makes local media an issue.

However, the protection of local media is not necessarily best served by media-specific ownership rules and this is arguably demonstrated by the Australian experience to date. By preventing the metropolitan licensees from expanding into non-metropolitan areas, the "75 per cent reach" rule was intended to encourage smaller regional operators to aggregate and establish their own networks.[788] Tolerance of affiliation and networking arrangements has been identified as undermining the production of local content.[789] Given such conditions and the absence of a media-specific public interest test, the liberalisation of local media ownership rules in the form that has been undertaken in the UK would not necessarily serve the public interest in the protection/promotion of local content in Australia.

The case for liberalising media ownership rules in Australia is made with regard to the broader regulatory landscape. Reference is made here to the other areas in which provision is made for the protection of local content in Australia. This includes the imposition of minimum levels of local content by commercial television licensees in regional markets by the Broadcasting Services Amendment (Media Ownership) Act 2006.[790] There are also

[787] 'Report to the Secretary of State (Culture, Media and Sport) on the Media Ownership Rules' (Ofcom, 17 November 2009) 6-7 <https://www.ofcom.org.uk/__data/assets/pdf_file/0024/42198/morrstatement.pdf> accessed 14 August 2017.
[788] Productivity Commission Inquiry Report (n 736) 367-368.
[789] ibid 368.
[790] Broadcasting Services Act 1992, s 43A (as inserted by paragraph 3 of Schedule 2 of the Broadcasting Services Amendment (Media Ownership) Act 2006).

requirements on Australian drama in the BSA and Australian Content Standard (though Australian content is not necessarily the same as local content).[791] The introduction of a media-specific public interest test in Australia in a form similar to that proposed in this thesis would further undermine the necessity for local media ownership rules.

5.5 Conclusions

The regulation of media mergers (including in the premium pay-TV context) concerns a range of complex social and cultural, as well as economic, considerations. Competition issues are met with fundamental issues such as media pluralism, diversity and localness of content. This is no less pronounced in the digital era. In fact, it is arguably more so given the increasing tendency towards market concentration, and possible tension between local and global considerations in regulating multi-media firms catering for a transcultural audience. However, it has been argued that this does not justify the retention of technologically-obsolete media ownership rules. Hence the case has been made for further deregulation of such rules, particularly in Australia.

Deregulation of the kind that has taken place in the UK, in relation to cross-media mergers and local content in particular, may not necessarily be appropriate in Australia on account of its geographically-dispersed, small population and smaller market. However, the proposed repeal of the technologically-obsolete "75 per cent reach" and "2 out of 3" rules under the Broadcasting Reform Bill is welcomed. Repealing these rules would also be desirable in that it would enable Australian broadcasters to restructure and rescale their businesses in the face of increasing competition from new media at the national and international levels. The introduction of a modified version of a UK-style public interest test could address enduring concerns about local

[791] Australian Content Standard (n 226). Part 7 of the Broadcasting Services Act 1992 requires 10 per cent of total drama expenditure on subscription television broadcasting services to be expended on Australian (or New Zealand) drama.

content (such as in relation to the proposed takeover of Ten by the special purpose vehicles of Lachlan Murdoch and Bruce Gordon). It has been suggested that the administration of such a test would justify the establishment of an industry-specific regulator along the lines of Ofcom, and the appointment of a communications commissioner within the ACCC. These recommendations are timely in view of the ACCC's revision of its Media Merger Guidelines.

Recent developments in the UK relating to the proposed acquisition by Twenty-First Century Fox of the remaining shares in Sky call into question whether the current regulatory regime is fit for purpose. This chapter has emphasised the importance of ensuring that the likely effects of the proposed acquisition are assessed with regard to the supply of pay-TV within the broader media landscape. As already noted, since News Corporation's proposed acquisition of Sky in 2010, there has been the split of the former News Corporation into News Corp and Twenty-First Century Fox.[792] Since then, however, Sky has developed considerably as an internet service provider. In addition to the identified trends relating to the increasing consumption of news online, Sky's growth as an internet service provider since 2010 calls for a detailed analysis of the possible implications in terms of competition and media plurality from a multi-media, multi-platform perspective.

The importance of adopting a suitably dynamic approach to media merger regulation in the UK is arguably reinforced in the light of Brexit. As regards the prevention and promotion of national champions, merger control rules affect the ability of national champions to acquire a dominant position at the UK

[792] The difference this makes in practice is arguably undermined by the fact that Rupert Murdoch remains executive chairman of both companies, Lachlan Murdoch is co-executive chairman of Twenty-First Century Fox, and James Murdoch is chief executive officer of Twenty-First Century Fox and chairman of Sky.

level, in order to achieve the critical mass to compete on the Internal market and global marketplace. The possible introduction of a transaction-value based threshold for merger notifications at the EU level could have implications for the UK. Potential divergence over time between the approaches in the UK and at the EU level could see an increase in regulatory costs and commercial risk for broadcasters at a time when the significance of territorial borders otherwise appears to be declining with respect to the supply and consumption of premium pay-TV. Given the challenges associated with the introduction of a transaction-value based threshold, the UK may benefit from waiting to see how the German experience plays out.

CHAPTER 6

REGULATION OF EXCLUSIVITY AND THE MIGRATION OF CONTENT TO PAY-TV

6.1 Introduction

Granting the rights to broadcast premium content on an exclusive basis is established commercial practice in the UK and Australia. At the same time, it is not without controversy from a competition law perspective, particularly where it involves the joint selling of live sports rights. In the analogue era, anti-siphoning regulation was introduced in both countries to limit the migration of major sporting events exclusively to pay-TV on the basis that the public interest lies in viewers being able to watch such events on FTA television. By restricting the ability of rights owners and broadcasters to enter into exclusive rights arrangements in respect of listed events, anti-siphoning regulation affects the structure of the wholesale and retail markets for such rights. Exclusive licensing is otherwise subject to the prohibitions on anti-competitive agreements in Chapter I of the CA1998/Article 101 of the TFEU and Section 46 of the CCA in the UK in Australia, respectively.

The regulatory challenge is to adopt an approach that promotes downstream competition in the retail supply of premium content to viewers without unnecessarily hindering competition in the wholesale supply and acquisition of the rights to broadcast such content. To this end, the chapter emphasises the importance of applying the existing legal frameworks in a technologically-neutral manner. This calls for revision of the scope of both the UK "listing" rules and the Australian "anti-siphoning" rules. As regards the residual role for competition law, the chapter argues that the ability and incentive for rights owners and pay-TV providers to enter into exclusive rights arrangements is reducing in the digital age of convergence. This is due to the increasing prevalence of multi-platform diversification, rights sharing by

commercial negotiation or as a requirement of general competition law, and the increasing popularity of direct-to-viewer models of distribution. To the extent that there remains such an incentive, it is suggested that the prospect of establishing consumer harm is likely to be reduced when a duly broad conception of the nature of competition in the broader communications environment is adopted.

6.2 Economic Rationale for Exclusive Rights to Premium Content

The motivation for rational, profit-maximising firms to enter into exclusive rights arrangements is fundamentally based on the higher return that exclusivity offers to rights owners and broadcasters.[793] The price that a single broadcaster will be willing to pay for exclusive rights is likely to exceed the sum of the prices paid by multiple broadcasters for non-exclusive rights.[794] Exclusive content provides a means by which broadcasters may differentiate their services in an increasingly crowded marketplace. The possibility of attracting more viewers creates the potential to increase revenue via subscription fees and/or advertising revenue. Also, where broadcast rights are sold on a collective basis, exclusivity ensures maximum short-term profitability.

The efficiency rationale for exclusivity underpins the theory of the Chicago School that incumbent firms are unable to profitably use exclusivity to exclude more efficient rivals from the market. Exclusivity is rationalised by legitimate business purposes, such as safeguarding relationship-specific investments and protecting upstream firms from free-riding by downstream rivals. Where exclusion is socially inefficient, the transfer from the excluding firm to consumers should exceed the gain of the incumbent firm in deterring entry

[793] Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *Métropole Télévision SA (M6) and Others v Commission of the European Communities* [2002] ECR II-03805 [60].

[794] Anne-Marie Wachtmeister, 'Broadcasting of Sports Events and Competition Law' (Competition Policy Newsletter, June 1998) 2 <http://ec.europa.eu/competition/speeches/text/sp1998_037_en.html> accessed 31 October 2016.

or inducing exit. This formed the basis of the Chicago School's criticism of the US Supreme Court's judgment in the *United Shoe Machinery* case.[795] The United Shoe Machinery Corporation was found to have attempted to prevent entry into the US shoe machinery market (in which it held an 85 per cent share), by inducing shoe manufacturers to enter into exclusive supply arrangements. Posner argued that customers would be unlikely to participate in strengthening its monopoly position without being compensated for the loss of any alternative and less costly sources of supply.[796]

The specific economic characteristics of premium pay-TV arguably support the efficiency rationale for exclusive broadcast rights. Content exclusivity may be the most efficient way of guaranteeing the value of a given broadcast and/or enabling a broadcaster to attract sufficient subscribers to achieve critical mass in order to recoup investment in innovation. However, as post-Chicago School economists note, there will be circumstances in which exclusive arrangements may be entered into by dominant firms with the purpose of raising rivals' costs and deterring efficient entry.[797] Exclusive dealing may reduce static efficiency by distorting competition, hindering the distribution of content through new platforms and increasing the prices charged to consumers, resulting in a loss of consumer welfare.[798]

[795] *United States v United Shoe Machinery* 347 US 521 (1954).
[796] Richard A Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976) 203. However, a monopolist may not need to compensate every customer, just enough to prevent the strongest rival from becoming a viable competitor. J Mark Ramseyer, Eric B Rasmunsen and John S Wiley, 'Naked Exclusion' (1991) 81(5) *American Economic Review* 1137.
[797] Antonio Nicita and Giovanni B Ramello, 'Exclusivity and Antitrust in Media Markets: The Case of Pay-TV in Europe' (2005) 12(3) *International Journal of the Economics of Business* 371, 378; Philippe Aghion and Patrick Bolton, 'Contracts as a Barrier to Entry' (1987) 77(3) *American Economic Review* 388; Ramseyer, Rasmunsen and Wiley (n 796); Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (West Publishing Co 1994).
[798] Antonio Nicita and Giovanni B Ramello, 'Property, Liability and Market Power: The Antitrust Side of Copyright' (2007) 3(3) *Review of Law & Economics* 7; David Harbord and Marco Ottaviani, 'Contracts and Competition in the Pay-TV Market' (July 2001) <http://faculty.london.edu/mottaviani/CWC.pdf> accessed 14 August 2017.

There is also the "double-marginalisation" problem where firms with market power at different levels in the vertical supply chain both charge a positive mark-up, inducing a deadweight loss to occur twice, resulting in excessively high market prices.[799] This may arise in the pay-TV context where premium channels are retailed by third parties. Since wholesale prices are structured as a price per subscriber, retailers have less of an incentive to attract additional subscribers by advertising or reducing retail prices, compared to when the wholesale price is a fixed lump sum payment.[800] It has been suggested elsewhere that the foreclosure effects of exclusivity may also be magnified where there are networks effects (and where consumers have substantial switching costs).[801]

However, this must be seen within the context of network effects arising (as suggested in Chapter 2) as an inherent characteristic of the pay-TV industry. Competition is *for* the market. So where rights are acquired by a pay-TV provider, content may migrate exclusively to pay-TV for the period of exclusivity. Given the socio-cultural functions of televised sport, the possible migration of content to pay-TV raises particular concerns in the context of major sporting events, some of which are consequently subject to anti-siphoning regulation.

6.3 Anti-Siphoning Regulation of the Migration of Sports Coverage to Pay-TV

By listing certain events for coverage on FTA television, anti-siphoning regulation inherently limits the ability of rights owners to grant the broadcast rights to such events on an exclusive basis. Restricting the freedom of rights

[799] Joseph J Spengler, 'Vertical Integration and Antitrust Policy' (1950) 58 *Journal of Political Economy* 247.

[800] 'Market Power in Pay TV: Annex 7 to Pay TV Market Investigation Second Consultation' (Ofcom, 30 September 2008) para 2.110 <https://www.ofcom.org.uk/__data/assets/pdf_file/0013/41503/annex7.pdf> accessed 14 August 2017.

[801] Paul Klemperer, 'Markets with Consumers' Switching Costs' (1987) 102(2) *Quarterly Journal of Economics* 375; Carl Shapiro, 'Exclusivity in Network Industries' (1999) 7(3) *George Mason Law Review* 1.

owners to negotiate in the first instance with pay-TV providers confers a competitive advantage on FTA broadcasters in the wholesale acquisition of the rights to listed events and imposes a downward pressure on the market value of such rights. The market impact of the more comprehensive Australian "anti-siphoning" rules is therefore especially contentious. Nevertheless, it is questionable whether a markedly different outcome would have prevailed in the absence of such rules, given that the Australian market is relatively small with fewer, less well financed players. Whilst acknowledging the ongoing debate as to whether anti-siphoning regulation has become obsolete, the focus here is on ensuring that the rules are applied in a technologically-neutral manner, so as to minimise unnecessary (and potentially counter-productive) regulatory interventions in the market.

6.3.1 Listing of events in the UK under the Broadcasting Act 1996

The concept of listing events in the UK developed as a voluntary agreement between the BBC and ITV, in 1956, that neither party would seek exclusive broadcast rights to events like the Olympic Games and Fédération Internationale de Football Association ("FIFA") World Cup.[802] This followed the passing of the Television Act in 1954, under which the Postmaster-General was empowered to make regulations to prevent the making of exclusive arrangements for the broadcasting of sports and other events of national interest to a restricted audience.[803] Shortly after the launch of Sky Television some 30 years later, the Cable and Broadcasting Act was enacted in 1984 to prevent events of national importance and significance from migrating exclusively to pay-TV. This required broadcast rights to be offered to the BBC and ITV on comparable terms.[804] The concept of listing "protected" events

[802] 'Review of Free-to-air Listed Events' (Report by the Independent Advisory Panel to the Secretary of State for Culture, Media and Sport, November 2009) para 13 <http://webarchive.nationalarchives.gov.uk/+/http:/www.culture.gov.uk/images/consultations/independentpanelreport-to-SoS-Free-to-air-Nov2009.pdf> accessed 14 August 2017.
[803] Television Act 1954, s 7(1).
[804] Cable and Broadcasting Act 1984, s 14.

was subsequently incorporated into the Broadcasting Act 1990 and is now contained in Part IV of the BA1996.

The listing of events under the BA1996 is subject to regulation at the EU level by the AVMSD. Article 14 of the AVMSD provides that a Member State may take measures to ensure that broadcasters do not broadcast, on an exclusive basis, events regarded by the Member State as being of major importance for society, in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events on FTA television.[805] This applies to "outstanding events which are of interest to the general public".[806] In the UK, the Secretary of State for Culture, Media and Sport is empowered by Section 97(1) of the BA1996 to designate sporting or other events of national importance or interest as listed events. "National interest" is defined in geographical terms as interest within England, Scotland, Wales or Northern Ireland.[807] In the absence of a legislative definition of "national importance", the Department for Culture, Media and Sport defines a listed event as "one which is generally felt to have a special national resonance", that contains an element which "serves to unite the nation, a shared point on the national calendar".[808]

Listed events are set out in Ofcom's Code on Sports and Other Listed and Designated Events.[809] The current list of events is reproduced in Appendix 3 of the thesis. Notably, the list remains unchanged,[810] aside from the fact that it is now comprised of two groups of events: Group A events and Group B

[805] AVMSD (n 92) art 14(1).
[806] ibid recital 52.
[807] ibid s 97(4).
[808] 'Coverage of Sport on Television' (Department for Culture, Media and Sport, undated) 4 <http://webarchive.nationalarchives.gov.uk/+/http:/www.culture.gov.uk/PDF/sport_on_television.pdf> accessed 14 August 2017.
[809] Ofcom Code on Listed Events (n 110).
[810] This is based on a comparison of the current list with the list as set out in Monopolies and Mergers Commission, 'British Sky Broadcasting Group plc and Manchester United PLC: A Report on the Proposed Merger' (Stationary Office, Cm 4305, 1999) appendix 4.2

events.[811] Full live coverage of Group A events must be offered to qualifying services. A "qualifying service" is a service provided without any consideration being required for reception of it and one that is received by at least 95 per cent of the UK population.[812] This includes BBC1, BBC2, ITV1, Channel 4 and Five.[813]

Group A events generally include events that are considered to be of international importance, such as the Olympic Games, FIFA World Cup finals and UEFA Champions League finals. Live coverage of Group B events may be shown on pay-TV as long as secondary coverage (i.e. deferred coverage or highlights) is offered to the BBC, ITV, Channel 4 and Five. This concerns events of a largely national nature, such as cricket test matches played in England and Six Nations rugby tournament matches involving home countries. However, the UK "listing" rules do not require or guarantee live coverage of listed events on FTA television in the UK.[814]

Notably, the UK "listing" rules do not apply to the coverage of Group A events through on-demand services or platforms. For instance, the rules do not apply to BBC iPlayer (even though the television licence requirement has been extended to BBC iPlayer).[815] Audience fragmentation resulting from the increasing consumption of content (and sport in particular) on mobile devices reinforces debate regarding the threshold for a substantial proportion of society for the purpose of Article 14 of the AVMSD. A point may be reached at which no service is received by 95 per cent of the UK population. There have already been calls from FTA broadcasters for the threshold to be

[811] See, 'New Protection for Football on Television in Revision of Listed Sporting Events' (Department for Culture, Media and Sport press release 135/98, 25 June 1998).
[812] Broadcasting Act 1996, s 98(2).
[813] Ofcom Code on Listed Events (n 110) annex 2.
[814] ibid para 1.10.
[815] BBC iPlayer largely replicates the FTA broadcast but has an increasing amount of additional content available exclusively on BBC iPlayer. For instance, in 2016, BBC Three ceased to exist as a linear broadcast television channel, becoming available only on BBC iPlayer and social media platforms.

reduced to 90 per cent.[816] If no FTA channels meet the 95 per cent threshold, pay-TV providers could secure exclusive access to listed events. A 90 per cent threshold is considered low enough to cover FTA broadcasters for the foreseeable future whilst still excluding pay-TV channels.[817]

By the Digital Economy Act 2017, the Secretary of State has been empowered to amend this threshold.[818] However, the extent to which this renders the UK listed events regime any more effective in the digital era is questionable. The fact that a FTA channel can be received by 95 or 90 per cent of the population does not mean that the channel is actually watched by that many viewers. In a fragmented multi-channel environment, it would arguably be more appropriate to adopt some measure that tests whether a channel is widely watched (i.e. an audience share test, based on share of the total number of minutes viewed across a calendar year). Until such time as the UK leaves the EU, any such measure would still have to comply with the requirement of the AVMSD that qualifying services are available to a substantial proportion of the population. Finding such a measure that is quantifiable and operational in practice may be difficult. However, there remain obvious limitations with replacing one quantitative threshold with another, which could itself soon become outdated and would necessitate constant review. This amendment therefore represents a temporary measure, not a long-term solution.

Another problematic area is the exclusion of electronic versions of newspapers and magazines from the scope of the AVMSD.[819] At a time when print media is rapidly moving online and digital newspapers are increasingly supplementing their articles with videos, this exclusion is problematic. The

[816] Katie Morley, 'BBC fears it could lose rights to major sporting events as broadcast rules ignore "iPad era"' *The Telegraph* (14 February 2017) <http://www.telegraph.co.uk/news/2017/02/14/bbc-fears-could-lose-rights-major-sporting-events-broadcast/> accessed 13 August 2017.
[817] ibid.
[818] Broadcasting Act 1996, s 98(5A) (as inserted by Section 97 of the Digital Economy Act 2017); HL Deb 8 February 2017, vol 778, col 1764.
[819] AVMSD (n 92) recital 28.

ECJ recently provided some clarity on the scope of this exclusion in *New Media Online*.[820] The ECJ provided a preliminary ruling to the effect that the video section of a newspaper's website constitutes an on-demand audio-visual media service subject to the AVMSD. This ruling was based on the fact that short videos placed in a stand-alone area of a newspaper's website are comparable to television broadcasts.[821]

What constitutes a "short" video for this purpose and whether digital newspapers will find ways of placing videos other than in stand-alone areas of their websites remains to be seen. The legislative proposal to amend the AVMSD, adopted on 25 May 2016,[822] provides that the principal purpose requirement of providing programmes to inform, entertain or educate, shall be satisfied if the service has audio-visual content and form that is dissociable from the main activity of the service provider.[823] The stand-alone parts of online newspapers "featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity" are given as an example.[824] However, market reality arguably calls for further consideration of this increasingly important area going forward. Particularly if the category for news and current affairs is extended to encompass sports news (as advocated in this thesis) because sports news is likely to include audio-visual highlights and highlights on television are subject to the UK "listing" rules (unlike under the Australian "anti-siphoning" rules).

[820] Case C-347/14 *New Media Online GmbH v Bundeskommunikationssenat and Der Bundeskanzler*, 1 July 2015.
[821] The ECJ ruled that the concept of "programme" within the meaning of Article 1(1)(b) of the AVMSD includes within the website of a newspaper, videos of short duration consisting of local news bulletins, sports and entertainment clips. Also, for the purpose of Article 1(1)(a)(i) of the AVMSD, assessment of the principal purpose of a service making videos available in the electronic version of a newspaper must focus on whether the service has content and form independent of the journalistic activity of the website operator. ibid [24, 37].
[822] 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities' COM (2016) 287.
[823] ibid para 3.
[824] ibid.

6.3.2 Listing of events under the Australian "anti-siphoning" rules

The Australian "anti-siphoning" rules were introduced in 1994, the same year that cable television was initially licensed in Australia.[825] Whilst pay-TV was in its infancy, FTA broadcasters and the Federal Government of Australia were concerned that major sporting events would be "siphoned-off" to pay-TV. Seven, Nine and Ten were also concerned that pay-TV would divert advertising revenue away from commercial FTA television at a time when television advertising revenue was already in decline.[826] Influenced by how extensive the Australian "anti-siphoning" list became, concern then emerged about FTA broadcasters "hoarding" the rights to listed events. This led to the introduction in 1999 of the Australian "anti-hoarding" rules.[827] However, as the "anti-hoarding" rules have been of limited practical significance,[828] the ongoing debate firmly remains focused on the Australian "anti-siphoning" rules.

The Minister for the Department of Communications and the Arts is empowered by Section 115(1) of the BSA to give notice, specifying events which in the opinion of the Minister should be made available free to the general public, on the basis of the national importance and cultural significance of such events. Such notice triggers a licence condition that prohibits pay-TV providers from acquiring the right to televise that event ahead of the ABC, SBS, Seven, Nine or Ten.[829] If broadcasting the event on FTA television will reach more than 50 per cent of the Australian population, a

[825] See, Commonwealth of Australia Gazette GN 26, 6 July 1994, 1766.
[826] Bob Stewart, *Australian Sport--better by Design? The Evolution of Australian Sport Policy* (Psychology Press 2004) 169.
[827] The "anti-hoarding" rules require Seven, Nine and Ten to offer to the ABC and SBS, for a nominal charge, broadcast rights to events that have been designated by the Minister but which they do not intend to exercise. ABC and SBS are subject to similar obligations to offer unused rights to one another. Broadcasting Services Act 1992, ss 146E and 146L; Broadcasting Services (Designated Series of Events) Declaration No.1 of 2000, sch.
[828] There is no obligation on offerees to accept offers and, to date, only the 2002 and the 2006 FIFA World Cup tournaments have been designated for the purpose of the Australian "anti-hoarding" rules.
[829] Broadcasting Services Act 1992, s 99 and sch 2, para 10(1)(e).

pay-TV provider may also broadcast the same event.[830] Where the broadcast rights to an event are not taken up, the event is automatically de-listed 12 weeks before it commences.[831] Once an event has been de-listed, pay-TV providers may apply for the right to televise it. However, as in the UK, there is no guarantee that listed events will be broadcast on FTA television in Australia.

The first Australian "anti-siphoning" list was set out in the Broadcasting Services (Events) Notice No.1 of 1994.[832] This was superseded by the Broadcasting Services (Events) Notice (No.1) 2004. The current list is contained in the Schedule to the Broadcasting Services (Events) Notice (No.1) 2010, which is reproduced in Appendix 4 of the thesis. A comparison of these lists shows how extensive the original list was and how over the subsequent 23 years it has not changed dramatically. The main changes are that basketball is no longer listed, but the Olympic Games and the Commonwealth Games have been added to the list.

The comprehensiveness of the Australian "anti-siphoning" list in relation to the UK list is clear from the types of sports that are listed and the number of events listed for each type of sport. The Australian "anti-siphoning" list refers to 36 classes of events across 12 different categories of sport. This is in contrast to the 19 classes of events that are listed in the UK across 7 categories of sport (with only 10 such classes being listed for full live coverage). Unlike the UK list, the Australian list extends to each match/round of a number of foreign tournaments, including the English Football Association ("FA") Cup final and each round of the US Masters golf tournament.[833] Also, with respect to national leagues, the Australian "anti-siphoning" list includes every regular

[830] ibid para 10(1)(e)(ii).
[831] De-listing is subject to the Minister publishing a declaration that the event in question continues to be specified in the notice. Broadcasting Services Act 1992, ss 115(1AA) and 115(1AB).
[832] See, Commonwealth of Australia Gazette GN 26, 6 July 1994, 1762.
[833] Broadcasting Services (Events) Notice (No.1) 2010, sch, paras 8.1 and 11.3.

season and play-off match played in both the AFL and the NRL.[834] Meanwhile, the Premier League is not a listed event in the UK.

Being more comprehensive than the UK "listing" rules, the Australian "anti-siphoning" rules impose greater restrictions on the freedom of sports rights owners in Australia to monetise their rights. This was noted, for example, by the AFL in its submission to the Productivity Commission's 1999 inquiry into broadcasting in Australia,[835] in which the inability to negotiate a package of rights for FTA television and pay-TV was said to constrain the AFL's total television revenue.[836] It has been argued elsewhere that the extensiveness of the Australian "anti-siphoning" rules have hindered the development of Australian pay-TV in the analogue era.[837] In contrast to the UK "listing" rules, for instance, the Australian "anti-siphoning" rules do not allow pay-TV providers to secure the exclusive rights to the live coverage of listed events.

Any extension of the rules to online media could pose a similar risk to the development of Australian pay-TV in the digital era. This does not, however, justify the prevailing platform-based approach to the application of the Australian "anti-siphoning" rules. The rules do not apply to sports coverage broadcast via the Internet or mobile devices. In its 2010 review of anti-siphoning regulation in the digital era, the Department of Broadband, Communications and the Digital Economy (now the Department of Communications and the Arts) found no need to extend the Australian "anti-siphoning" rules beyond traditional broadcast television in the absence of

[834] ibid paras 4.1 and 5.1.
[835] 'Submission to the Productivity Commission – Inquiry into Broadcasting' (AFL, December 1999) <http://www.pc.gov.au/inquiries/completed/broadcasting/submissions/subdr240/subdr240.pdf> accessed 10 August 2017.
[836] ibid 20.
[837] See, for example, 'Submission to the Productivity Commission – Broadcasting Inquiry' (ASTRA, May 1999) 12 <https://www.pc.gov.au/inquiries/completed/broadcasting/submissions/australian_subscription_television_and_radio/sub080.pdf> accessed 10 August 2017.

evidence of sports coverage being siphoned-off to new media.[838] However, the number of Australians who consume sport content online is increasing,[839] and this trend is likely to gather pace with the development of the NBN.[840]

Since this review, Seven, Nine and Ten have developed their own online services. In 2016, for the first time an Australian FTA network used its digital platform to charge viewers for access to sports coverage. Reference is made here to the launch of the Seven Olympics app, which cost the individual viewer AU$20-25 for live coverage of the 2016 Rio Olympic Games.[841] This blurring of the distinction between the services of FTA television and traditional pay-TV undermines the generic justification for listing events to ensure viewers can watch them at no additional direct cost. It is argued here that, as with the UK "listing" rules, the Australian "anti-siphoning" rules should apply in a platform-neutral way.

6.3.3 Importance of technological-neutrality in anti-siphoning regulation

A common argument advanced by traditional pay-TV providers in particular, is that anti-siphoning regulation limits the earning potential for sports bodies, and reduces the quantity and quality of sports coverage on television. Anti-siphoning rules should therefore apply in the same way to every player or not at all. By not applying to SVOD platforms, anti-siphoning rules impose an

[838] 'Sport on Television: A Review of the Anti-Siphoning Scheme in the Contemporary Digital Environment' (Department of Broadband, Communications and the Digital Economy, November 2010) 31-32 <https://www.clearinghouseforsport.gov.au/__data/assets/pdf_file/0004/405850/ReviewReport.pdf> accessed 13 August 2017.

[839] Monique Perry, 'Connecting people with sport: 11.2 million Australians go online for sports content' (Nielsen, 10 May 2017) <http://www.nielsen.com/au/en/insights/news/2017/connecting-people-with-sport.html> accessed 16 May 2017.

[840] 'Evidence relating to the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012' (ASTRA, 20 April 2012) 18.

[841] Jake Mitchell, 'Rio Olympics: Seven to launch paid subscription service' *The Australian Business Review* (6 June 2016) <http://webcache.googleusercontent.com/search?q=cache:dVFffLZG9scJ:www.theaustralian.com.au/business/media/rio-olympics-seven-to-launch-paid-subscription-service/news-story/5f93d949500601d70dee4c95c765a9fc+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 13 August 2017.

arbitrary restriction on the ability of traditional pay-TV providers to acquire the broadcast rights to major sporting events. This restriction may legitimately have been considered as appropriate at the time of the introduction of traditional pay-TV. Perversely, however, it places domestic content producers at a competitive disadvantage to the likes of Netflix, Facebook and Google, to which advertising revenue is being diverted. In this respect, the current loophole in respect of SVOD is arguably self-defeating.

Adopting a technologically-neutral approach to the enforcement of anti-siphoning rules is also consistent and necessary in connection with the support elsewhere in this thesis for the reform of Australian media-specific ownership rules. The market would arguably otherwise be distorted further in favour of the "winners" of the proposed media ownership reforms. Also, the anti-siphoning rules are currently based on a definition of pay-TV as it emerged in the analogue era. It does not reflect the broader definition of pay-TV in the digital era which includes the subscription-based television services of FTA broadcasters, telecommunications service providers and SVOD platforms.

6.4 Regulation of Exclusive Broadcast Rights under UK/EU Competition Law

As with exclusive licensing generally, the granting of exclusive rights to broadcast premium content in the UK is potentially subject to the Chapter I prohibition on anti-competitive agreements, or the corresponding prohibition in Article 101 of the TFEU where there is an effect on trade between Member States.[842] Undertakings can infringe Article 101 by object, where the agreement is by its very nature anti-competitive (as in the case of price-fixing, import/export restrictions and absolute territorial protection), or by effect.

[842] No known decisions have been made in respect of the joint selling of sports rights by a single supplier under Article 102 of the TFEU or Section 46 of the CCA. As seen in the previous chapter, adverse structural effects of exclusive rights arrangements of excessive duration and/or scope may also be relevant in merger appraisals.

This is subject to the possibility of exemption from prohibition under Article 101(3) of the TFEU or the Vertical Agreements Block Exemption Regulation (which exempts (non-object) exclusive distribution agreements where the market share of neither the supplier nor the buyer exceeds 30 per cent).[843] The focus here is on regulation under Article 101, since it is at the EU level that seminal cases have established the analytical framework for examining exclusive distribution and supply agreements (including where exclusivity forms part of a collective selling arrangement). Despite Brexit, such case law is likely to continue to underpin UK law in this area for the foreseeable future.

6.4.1 Exclusive licensing of sports rights under Article 101(1) of the TFEU

Exclusive distribution and supply agreements have traditionally been received with some suspicion at the EU level on the basis that they may be used to erect barriers to trade between Member States. This is exemplified by an early ruling of the ECJ in *Consten and Grunding*.[844] There was a sole and exclusive distribution agreement between Grundig (a German manufacturer of electrical and electronic equipment) and a French distributor of a range of Grundig products (including radio receivers, recorders, dictaphones and television sets). The ECJ found the agreement to be restrictive of competition by object for restricting which distributors could sell the relevant products, and for limiting how the relevant products could be imported/exported.[845] Since the agreement was found to be restrictive of competition by object, it was considered unnecessary to examine the effects of the agreement on the market.[846]

[843] Commission Regulation No.330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, art 3(1).
[844] Joined Cases C-56-64 and C-58-64 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 00429.
[845] ibid 343.
[846] ibid 342.

Following *Coditel II*,[847] exclusive broadcast rights are not as such prohibited by Article 101(1) of the TFEU. A Belgian film distribution company acquired the exclusive right to distribute a film in Belgium. A German version of the film was subsequently obtained by Belgian television provider (Coditel) and distributed to Coditel's subscribers. Drawing on the distinction between the existence and exercise of intellectual property rights, the ECJ confirmed that neither copyright in a film nor the right to exhibit a film in themselves infringe Article 101(1).[848] Advocate General Reischl acknowledged how the specific subject-matter of the copyright in a film is comprised of not only the right to prevent unauthorised third parties from exploiting it, but also the right to have it exploited by a single person.[849] However, the ECJ confirmed that the exercise of such rights may infringe Article 101(1), where economic or legal circumstances restrict film distribution to an appreciable degree or distort competition on the market, having regard to the characteristics of that market.[850]

The issue of the potential barriers to entry arose in relation to the Premier League's first television deal in 1992 with Sky and the BBC. In the *Football Association* case,[851] the European Commission sanctioned a 5-year licensing agreement under which the English Football Association granted exclusive rights for the BBC and Sky (then BSkyB) to alternate the transmission of live matches between 1988 and 1993. Whilst this was deemed to infringe Article 101(1), an exemption was granted under Article 101(3). Exclusivity for a period of five years was considered necessary for Sky as a new entrant to

[847] Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECR 3381.
[848] ibid [17].
[849] Opinion of Advocate General Reischl in Case 262/81 delivered on 14 September 1982, 3412.
[850] *Coditel II* (n 847) [17-19].
[851] See, Draft notice pursuant to Article 19 (3) of Council Regulation No.17 concerning a notification in Case No IV/33.145 *ITVA/Football Authorities* and Case No IV/33.245 *BBC, BSB and Football Association* [1993] OJ C94, 6.

embrace the then emerging satellite broadcasting technology.[852] This follows the finding of the ECJ in *Société Technique Minière* that exclusive distribution agreements will not restrict competition contrary to Article 101(1) if appointing an exclusive distributor is necessary to enable a manufacturer to enter a new market,[853] so long as there is no absolute territorial protection (as in *Consten and Grundig*).[854] The issue of absolute territorial protection has arisen in relation to the distribution of premium movie rights by Sky. As noted in Chapter 1, the European Commission has accepted commitments from Paramount, and such commitments notably apply to film licensing contracts with traditional pay-TV services and SVOD services alike.[855]

Then EU Competition Commissioner Karel Van Miert subsequently commented that the 5-year term was in retrospect "probably too long", as satellite broadcasting developed more rapidly than expected.[856] In the *KNVB/Sport 7* case,[857] an exclusive 7-year term was considered too long. This case concerned the collective selling of exclusive rights (and preferential treatment) by the Dutch football association to then emerging commercial television broadcaster, Sport 7.

There was not a formal decision by the European Commission since Sport 7 ceased broadcasting in December 1997.[858] Prior to this, however, Commissioner Van Miert expressed concern about the duration of the agreement (and the renewal clause).[859] The exclusive licensing of rights to

[852] Hazel Fleming, 'Exclusive Rights to Broadcast Sporting Events in Europe' (1999) *European Competition Law Review* 143, 145.
[853] Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, 250.
[854] *Consten and Grundig* (n 844).
[855] n 72.
[856] Karel Van Miert, 'Sport and Competition' (Speech to the European Sport Forum, 27 November 1997).
[857] See, Notification of a licensing agreement for the broadcasting of Dutch football matches in *KNVB/Sport 7* (Case No IV/36.033) [1996] OJ C228/4.
[858] Fleming (852) 146.
[859] Van Miert (n 856).

sporting events as part of collective selling arrangements has been received with particular caution by the European Commission. Reducing the duration and scope of exclusivity under such arrangements has been perceived as one way of allaying concerns over the control of sports rights in the hands of a small number of established pay-TV providers.[860]

6.4.2 Role of exclusivity in the joint selling of sports rights in the UK/EU

The collective selling of television rights involves sports clubs as rights owners assigning the media rights in their matches to the relevant association/league and the association/league then selling the rights on behalf of all the clubs. For instance, in the case of the Premier League, all television rights are owned by the FAPL, rather than the individual clubs. The FAPL sells television rights to Premier League matches on behalf of all of the clubs and distributes the revenue from such rights in accordance with Rule D of the Premier League Handbook.[861] The individual clubs agree to provide such rights, facilities and services to enable the FAPL to fulfil this role.[862]

Traditionally, an association would sell all media rights in one large exclusive contract to a single broadcaster in each territory. As clubs are prevented from competing in the sale of the rights, a collective selling arrangement constitutes a horizontal restriction on competition. However, collective selling may be preferable from a social welfare perspective where leagues are small and relatively homogenous in terms of bargaining power, and where teams receive little performance-related revenue.[863] By creating a single point of sale, collective selling can provide efficiencies through improved

[860] This is subject to criticism regarding the effectiveness of the European Commission's approach. For instance, lost viewership from the Premier League's collective selling arrangements during 2003 was said to be as much as 200million over the year. David Harbord and Stefan Szymanski, 'Restricted View: The Rights and Wrongs of FA Premier League Broadcasting' (Report for the Consumers' Association, 2003) 25 <http://market-analysis.co.uk/PDF/Topical/CAFAPL-SkyReport.pdf> accessed 30 July 2017.
[861] Premier League Handbook (n 177).
[862] ibid Rule D.3.
[863] See, Sonia Falconieri, Frédéric Palomino and József Sákovics, 'Collective versus Individual Sale of Television Rights in League Sports' (2004) 2(5) *Journal of the European Economic Association* 833.

production and distribution. In recognition of the role of negotiating exclusive rights on a collective basis within the commercial exploitation of sports rights, commitments may be used to limit the potentially restrictive effects of such exclusivity on the market.

However, this is subject to restrictions that the market may itself impose on the number of firms that may compete effectively, as was the case in *Attheraces*.[864] In 2002, 49 of the then 59 British racecourses agreed to pool their media rights and sell them to a new channel funded by a consortium comprised of Sky, Channel 4 and Arena Leisure Plc. The OFT's decision that the arrangement infringed the Chapter I prohibition of the CA1998 was overturned by the Competition Appeal Tribunal ("CAT").[865] Interactive betting on horse racing was then an emerging product in the UK. To compete, it was necessary to acquire rights from as many racecourses as possible.[866] The CAT found there could be only one successful bidder and collective negotiation was the only viable means of achieving critical mass. This may apply to emerging platforms in the broadcasting context.

6.4.2.1 EU position on exclusivity in the collective negotiation of sports rights

A quantitative approach has emerged in relation to the commitments the European Commission requires, as initially evident in *UEFA Champions League*.[867] This case concerned the sole and exclusive right of UEFA to sell FTA and pay-TV rights on behalf of UEFA Champions League clubs. UEFA proposed to sell the rights on an exclusive basis, in a single bundle to one broadcaster per defined territory, for a period of several consecutive years. The European

[864] *The Racecourse Association & Others and the British Horseracing Board v Office of Fair Trading* [2005] CAT 29 (*Attheraces*).
[865] Decision of the Office of Fair Trading No.CA98/2/2004, Notification by Arena Leisure plc/Attheraces Holdings Limited/British Sky Broadcasting Group plc/Channel Four Television Corporation/The Racecourse Association Limited, 5 April 2004 (Case CP/1442-01) [342 and 447].
[866] *Attheraces* (n 864) [168].
[867] *Joint selling of the commercial rights of the UEFA Champions League* (Case 37.398) [2003] OJ L291/25.

Commission expressed concern that this would lead to only one source of supply and a single large broadcaster per territory acquiring all of the rights.[868] There was also concern that some of the rights would remain unused.[869]

UEFA put forward the solidarity argument (noted in Chapter 2), that its centralised model supports the development of European football by ensuring a fairer distribution of revenue, improving production and stimulating the development of sport. The European Commission acknowledged the argument in principle, but rejected it as grounds for exemption on the facts of the case.[870] The rights were split into several different rights packages, the term was limited to no more than three years, and the packages were to be sold separately by means of a public bidding process. Holdbacks were reduced and individual clubs were allowed to sell certain rights in parallel with UEFA on a non-exclusive basis. The commitments aimed to increase the opportunities for more broadcasters to acquire the rights. However, the long-term effect on the market is questionable given that, as already noted, all UK television rights to exclusively broadcast live UEFA Champions League matches for 2015-2018 are now held by BT.

Similar commitments formed the basis of the European Commission's decision in the *Bundesliga* case.[871] This included the unbundling of rights into packages to be offered on a transparent and non-discriminatory basis, with terms again limited to three years and holdbacks reduced. The appropriate period of exclusivity will depend upon the facts of the individual case. For instance, in its *Telepiù/Stream* merger decision,[872] which gave rise to the

[868] ibid [19].
[869] ibid.
[870] ibid [164-167].
[871] *Joint selling of the media rights to the German Bundesliga* (Case COMP/C.2-37.214) OJ L(2005)134/46. This was notably a commitments decision, as opposed to an exemption decision.
[872] *Newscorp/Telepiù* (n 139).

creation of SkyItalia, the European Commission limited the exclusive period in respect of football rights to two years and to direct-to-home satellite transmission only.[873] Limiting the term of the exclusive agreements to two years was considered appropriate in view of the strong market position held by SkyItalia.[874]

A decade after the formation of the Premier League, the European Commission expressed concerns similar to those raised in the *UEFA* case.[875] A statement of objections was issued to the effect that the FAPL's joint selling arrangements had the effect of foreclosing the market for other broadcasters and limiting media coverage of football events to the detriment of consumers.[876] The restrictions on competition were not considered indispensable for guaranteeing solidarity between the clubs.[877] Commitments effective from the 2007/2008 season included the sale of live and near-live rights in packages,[878] by means of a transparent and non-discriminatory bidding process.[879] No holdback provision was permitted in relation to mobile rights,[880] and no single buyer was allowed to acquire all of the packages of live rights.[881] In this respect, the decision can be distinguished from that in the *UEFA* case, on the basis that it compels the sharing of the rights. However, the extent to which this was achievable in practice was limited by the fact that only a small number of broadcasters were in a position to bid for the rights. This was exemplified by the Setanta saga, following which Sky remained the

[873] An exclusive period of three years was permitted for movie rights. ibid [233-234].
[874] ibid [235].
[875] *FA Premier League* (n 353).
[876] 'Commission opens proceedings into joint selling of media rights to the English Premier League' (European Commission press release IP/02/1951, 20 December 2002) <http://europa.eu/rapid/press-release_IP-02-1951_en.htm?locale=en> accessed 14 July 2017.
[877] ibid.
[878] *FA Premier League* (n 353) annex, commitments 2 and 4.
[879] ibid commitments 7 and 8.
[880] ibid commitment 5.
[881] ibid commitment 3.2.

dominant bidder for the live rights to the Premier League, until BT secured two of the rights packages in 2015.

6.4.2.2 UK position on the joint selling of exclusive sports rights

The joint selling of broadcast rights to the Premier League has more recently been under the regulatory spotlight in the UK. On 18 November 2014, Ofcom commenced an investigation into the joint selling of live UK audio-visual media rights for Premier League football matches.[882] This followed a complaint from Virgin Media that the Premier League limiting the number of matches available for live television in the UK to 41 per cent allegedly infringed the Chapter I prohibition of the CA1998 and/or Article 101(1) of the TFEU. On 10 August 2016, Ofcom closed the case.[883] In doing so, it took into account the Premier League's decision to increase the number of matches available for live television in the UK to a minimum of 190 per season from the start of the 2019/2020 season.[884]

The next auction will also include a "no single buyer" rule, reserving at least 42 matches per season for a second buyer.[885] This broadly replicates the commitments accepted at the EU level. However, the fact remains that there will continue to be a relatively small number of firms that will be in a position to compete aggressively for such rights. This is not acknowledged as the basis for further regulatory intervention in the market, but rather as an inherent characteristic of the market. The issue is the relative extent to which the discussed commitments offer a more competitive outcome than market forces alone would provide, having regard to the oligopolistic nature of the

[882] 'Ofcom investigation into Premier League football rights' (Ofcom media release, 18 November 2014) <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2014/premier-league> accessed 13 August 2017.
[883] 'Competition Act investigation into the sale of live UK audio-visual media rights to Premier League matches' (Ofcom Competition Bulletin CW/01138/09/14, 8 August 2016) <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01138> accessed 13 August 2017.
[884] ibid.
[885] ibid.

market. In this respect, the less hostile response in Australia to the collective negotiation of exclusive rights may be preferable.

6.5 Australian Competition Law on Exclusive Broadcast Rights

As under UK/EU competition law, the granting of exclusive broadcast rights is not in itself unlawful under Australian competition law. However, if the licensing agreement contains an exclusionary provision within the meaning of Section 4D of the CCA,[886] or has the purpose, effect or likely effect of substantially lessening competition, it may be subject to prohibition under Section 45 of the CCA.[887] There is the possibility of exemption for exclusive dealing arrangements that are notified pursuant to Section 47 of the CCA. With the exception of third-line forcing,[888] exclusive dealing will infringe Section 47 only where it has the purpose, effect or likely effect of substantially lessening competition.[889] This is most likely to be the case if there is considered to be insufficient interbrand competition. Whilst in the *C7* case,[890] the requirements of neither Sections 45 nor 47 were found to be satisfied.[891]

6.5.1 Joint selling of exclusive rights under Sections 4D and 45 of the CCA

It has been suggested elsewhere that given the size of the Australian market, and the structure and funding of elite sport in Australia, the negotiation of sports rights is unlikely to be anything other than on a collective basis.[892]

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[886] Section 4D of the CCA provides that "[a] provision of a contract, arrangement or understanding will be an exclusionary provision if it is between competitors and has the purpose of preventing, restricting or limiting the supply of goods/services to, or acquisition of goods/services from, particular persons, by a party or related body corporate."

[887] Where an exclusive supply arrangement is entered into by a corporation with substantial market power, it may also contravene the prohibition on the misuse of market power in Section 46 of the CCA. Section 46 is considered in the following chapter within the context of unilateral refusal to supply.

[888] For the definition of third-line forcing, see n 109. The Competition Policy Review Bill proposes the prohibition of third-line forcing only where it has the purpose, effect or likely effect of substantially lessening competition. Competition and Consumer Amendment (Competition Policy Review) Bill 2017, sch 7.

[889] Competition and Consumer Act 2010, s 47(10).

[890] *Seven Network Limited v News Limited* [2007] FCA 1062; [2009] FCAFC 166.

[891] ibid [3302-3304].

[892] Healey (n 20) 226-227.

Healey refers to the small Australian market, the number of games played in the individual codes, the failure of any football/soccer code to truly dominate the viewer landscape, and the relatively under-developed nature of most club brands.[893] In contrast to the bigger football clubs in the UK (such as Manchester United and Arsenal which are listed on the London Stock Exchange), Australian clubs appear relatively under-funded.[894] This may partly explain the less hostile response of the ACCC and Australian courts to the negotiation of exclusive sports rights on a collective basis.

The collective negotiation of exclusive broadcast rights may infringe Section 45 of the CCA or give rise to cartel conduct.[895] Prohibition as such is subject to the possibility of the parties securing authorisation from the ACCC.[896] In 2006, the Coalition of Major Professional Sports sought authorisation for the collective negotiation of agreements with sports betting operators for a period of five years. The operators would be entitled to offer and accept wagers on events played under the auspices of the applicants, which included the NRL, the Australian Rugby Union and Football Federation Australia.[897]

The ACCC found that the possible anti-competitive effects of the arrangements included inhibiting competition between coalition members to supply information to sports betting operators.[898] This could have increased costs for such operators which were likely to be passed on to consumers. It

[893] ibid 226.
[894] ibid.
[895] "Cartel conduct" includes price-fixing, dividing markets, restricting output and bid-rigging. Such conduct is prohibited where made or given effect to in a contract, arrangement or understanding between parties, two or more of whom are competitors (or would be competitors but for the conduct in question). Competition and Consumer Act 2010, s 44ZZRD.
[896] ibid s 88.
[897] Other applicants included the Lawn Tennis Association of Australia Limited, PGA Tour of Australia Limited and Cricket Australia. Application for Authorisation (A91007), lodged by the Coalition of Major Professional Sports in relation to collective negotiations with sports betting operators, 11 July 2006.
[898] ACCC Determination on the Application for Authorisation (A91007), lodged by the Coalition of Major Professional Sports in relation to collective negotiations with sports betting operators, 13 December 2006, i.

concluded, however, that any such detriment would be outweighed by transaction cost savings and the public benefits which were likely to be generated by the arrangements.[899] Whilst this was a collective bargaining case, it indicates the ACCC's willingness to identify the efficiencies that may be generated by collective negotiations, when a fair share of such efficiency gains will benefit consumers.

Collective negotiations may also give rise to an exclusionary provision under Section 4D of the CCA. However, it would appear more difficult to ascribe a specific purpose to sports leagues for the purpose of Section 4D following *News Ltd v South Sydney*.[900] This case concerned the exclusion of South Sydney from becoming a member of the then newly formed NRL. Gleeson CJ stated that "purpose" in Section 4D was to be distinguished from motive, and the relevant purpose was the end the parties had in mind when they included the relevant term.[901] The relevant term in this case concerned limiting the competition to 14 teams on the understanding that this was the most appropriate number of teams for a viable and sustainable competition.[902] In overturning the decision of the FCAFC, the HCA concluded that the parties had not acted with the purpose of excluding any particular club(s).[903] Notably, the Competition Policy Review Bill proposes the repeal of Section 4D.[904]

6.6 Foreclosure Effects of Exclusive Rights to Premium Content in the Digital Era

The ability and incentive of rights owners and traditional pay-TV providers to enter into exclusive rights arrangements in the digital era is arguably diminishing. Multi-platform diversification suggests an increase in the distribution of premium content on a non-exclusive basis. The perceived

[899] ibid ii.
[900] *News Limited v South Sydney District Rugby League Football Club Limited* [2003] HCA 45.
[901] ibid [18].
[902] ibid [214-215].
[903] *South Sydney District Rugby League Football Club Ltd v News Limited* [2001] FCA 862.
[904] Competition and Consumer Amendment (Competition Policy Review) Bill 2017, sch 4, para 1.

rewards of exclusivity for pay-TV providers appear to be reducing with the increasing tendency for premium content to be shared under joint purchasing and sub-licensing arrangements. The scope for entering into exclusive rights arrangements is also limited by the rise of the direct-to-viewer model of distribution. These developments call for a review of the conceptual framework for assessing the foreclosure effects of exclusive rights arrangements involving traditional pay-TV providers.

6.6.1 Increase in non-exclusive, multi-platform distribution strategies

Multi-platform diversification refers to the transition of single sector media firms to the distribution of content and services via multiple platforms. Aided by technological convergence, this trend has been identified from the changing broadcasting environments in the UK and Australia, in terms of the competitive responses of traditional pay-TV providers and new entrants alike. The adoption of non-exclusive, multi-platform distribution strategies will be limited, to some extent, by the increased transaction costs of entering into multiple contracts.[905] There are also the costs involved in developing a revenue model that is fully adapted to the economic characteristics of digitalisation and the Internet, including the supply of content on a freemium basis.[906]

Offering content free-of-charge can be used to expand the user base and generate network externalities, and sell higher-quality content to some users at a positive price.[907] However, distributing content across multiple platforms also offers the potential to realise economies of scale and scope. It facilitates the provision of additional and improved access to content, whilst enhancing

[905] Evens, Iosifidis and Smith (n 24) 46.
[906] Gillian Doyle, 'From Television to Multi-Platform: Less from More or More for Less?' (2010) 16(4) *Convergence: The International Journal of Research into New Media Technologies* 431, 445.
[907] Jean J Gabszewicz, Joana Resende and Nathalie Sonnac, 'Media as multi-sided platforms' in Picard and Wildman (n 236) 22.

the possibilities for sustaining effective audience engagement.[908] Connectivity also has the potential to transform relationships between content suppliers and viewers, thereby providing additional business opportunities.[909] These opportunities are increasingly valuable to broadcasters in a gradually more crowded market.

The adoption of non-exclusive, multi-platform distribution strategies provides the possibility of opening up access to broadcast rights that would otherwise only be available to a small number of established broadcasters. This implies an increase in downstream competition in the retail supply of content to viewers and the opportunity for greater diversity of content.[910] This should feature in the assessment of possible foreclosure effects of the granting of premium content rights on an exclusive basis. Of course, rights owners may retain an incentive to grant exclusive rights to an individual broadcaster in respect of a specific distribution platform. It therefore becomes especially important that the scope of exclusive rights is clearly defined. This begins fundamentally with how "broadcasting" is defined.

In a multi-media environment, the definition of "broadcasting" is increasingly open to interpretation. This is exemplified by the recent judgment of the Supreme Court of New South Wales in *WIN v Nine Network*.[911] In this case, live streaming was not deemed to constitute "broadcasting" within the meaning of the programme supply agreement between WIN Corporation and Nine, Clause 2.1 of which stated:[912]

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[908] Doyle (n 906) 437.

[909] Gillian Doyle, 'Multi-Platform Media and the Miracle of the Loaves and Fishes' (2015) 12(1) *Journal of Media Business Studies* 49, 61.

[910] Recent research suggests that whilst multi-platform distribution is improving content diversity, it is also in many cases encouraging the recycling of the same content across multiple platforms, placing greater emphasis on a narrow range of high impact content. Katherine Champion, Gillian Doyle and Philip Schlesinger, 'Researching Diversity of Content in a Multi-Platform Context' (2015) 3(1) *The Political Economy of Communication* 39.

[911] *WIN Corporation Pty Ltd v Nine Network Australia Pty Limited* [2016] NSWSC 523.

[912] ibid [4].

> Nine grants WIN the exclusive licence to broadcast on and in the licence areas covered by the WIN Stations the programme schedule broadcast by Nine on each of the channels known as 'Nine', 'NineHD', '9Go', '9Gem', 'Extra' and '9Life' (the 'Nine Channels'), to be picked up by WIN at Nine's NPC.[913]

Nine was transmitting its programme schedule by live Internet streaming in the licence areas covered by the WIN Stations (the WIN licence areas). WIN claimed Nine was in breach of contract by broadcasting within the meaning of Clause 2.1, and even if Nine was not broadcasting as such, it still breached an implied obligation not to live stream in the WIN licence areas. WIN argued that it would be strange if the parties, knowing of the potential to deliver Nine programming by various means (such as the Internet), intended to limit exclusivity to traditional broadcast FTA television.[914]

The Supreme Court of New South Wales concluded that the definition of "broadcasting" was restricted to FTA broadcasting on two main grounds. Firstly, the reference to licence areas could refer only to FTA broadcasting because the relevant licences covered just FTA television.[915] Secondly, at the time of the agreement, Nine was not in a position to grant Internet streaming rights to WIN in relation to all content (including the NRL) that was the subject of Nine's FTA television broadcast.[916] The mere fact that live streaming was technologically available at the time of the agreement was considered to be insufficient in itself to include live streaming within the scope of the

[913] ibid [1].
[914] ibid [47].
[915] ibid [82].
[916] ibid [83].

agreement. As a consequence, Nine was not prevented from streaming its programme schedule live via the Internet.[917]

It is important that there is a sufficient degree of legal certainty for the duration of commercial agreements, particularly in innovation-driven industries requiring substantial investment. However, this is an instance in which tension can arise between the need for commercial certainty and resolving contractual disputes in a way that adequately reflects economic reality in a rapidly changing industry. The New South Wales Court of Appeal indicated that the word "broadcast" can have different meanings depending on the context.[918] So the finding in this case does not mean that the concept of "broadcasting" will necessarily be interpreted again in this way.

However, the approach adopted in this case is arguably overly restrictive, particularly as regards the reasoning behind the second ground for the Supreme Court's decision. This line of reasoning seems to be inconsistent with the sentiment which underpins the HCA's statement in *Queensland Wire* that, even if there have not been any transactions in a market, it is sufficient (for market definition purposes) if there is the potential for close competition.[919] Since live streaming was technologically available when the agreement was made, there was the potential for dealings in relation to the granting of Internet streaming rights. If the line of reasoning followed in *WIN v Nine Network* was adopted more generally going forward, it could disregard the need of contracting parties for both commercial certainty and flexibility in adapting to changes in commercial reality in the digital economy.

[917] This decision was upheld by the New South Wales Court of Appeal. *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297.
[918] ibid [27].
[919] *Queensland Wire* (n 471) [109].

6.6.2 Growth of the direct-to-viewer model of distribution

It has been identified that rights owners are increasingly supplying content directly to viewers, as a means of capitalising on the additional revenue stream from pay-TV or pay-per-view subscriptions, and monetising the global reach of the Internet. This trend is attributable in part to the increasing investment in the production of exclusive dramas and the direct supply of sports coverage by rights owners (either in place or in addition to coverage under rights arrangements with third parties). Manchester United set a precedent in this regard in the UK with the launch of MUTV in 1998. Some 10 years later, Australian soccer teams began to do the same, with the launch in 2009 by Collingwood Football Club of its official YouTube channel, CollingwoodTV. There are higher costs and risks in adopting the direct-to-viewer model of distribution. For instance, sports clubs have fewer financial guarantees when marketing their rights themselves, and this may put their ability to offer high quality content at risk.[920]

Nevertheless, the economic potential to be realised by supplying content directly to viewers is exemplified by the decision of Real Madrid in 2016 to distribute content via Facebook Live. Real Madrid TV has since gone live on Facebook more than 128 times, generating over 110million video views, with its content (including behind-the-scenes footage, and pre-game and post-game programmes) appearing in social feeds over a billion times.[921] The economic potential will depend of course on the reputation and relative performance of the individual club.[922] Generally speaking, however, this is

[920] Evens, Iosifidis and Smith (n 24) 46.

[921] Tony Connelly, 'Real Madrid's decision to take its TV channel to Facebook Live could be a sign of things to come' (*The Drum*, 26 October 2016) <http://www.thedrum.com/news/2016/10/26/real-madrids-decision-take-its-tv-channel-facebook-live-could-be-sign-things-come> accessed 30 July 2017.

[922] Mike Ozanian, 'The World's Most Valuable Soccer Teams 2016' *Forbes* (11 May 2016) <https://www.forbes.com/sites/mikeozanian/2016/05/11/the-worlds-most-valuable-soccer-teams-2016/> accessed 30 July 2017.

significant from an advertising revenue perspective, given the rapid growth of social media as an advertising platform.[923]

It is important that multi-sided platform considerations are taken into account when assessing whether exclusive rights arrangements are restrictive of competition. In the *Cartes Bancaires* case the ECJ expressly extended the contextual analysis as to whether conduct is restrictive of competition by object, within the meaning of Article 101(1) of the TFEU, to all of the sides of card payment systems as multi-sided platforms.[924] In the *MasterCard* case, the ECJ broadened the assessment of any countervailing efficiencies for the purpose of Article 101(3) "not only on the market in respect of which the restriction has been established, but also on the market which includes the other group of consumers associated with that system".[925] Since the European Commission can rely on aspects of all sides of a multi-sided market/platform to establish a restriction on competition for the purposes of Article 101(1), undertakings should be able to rely on countervailing efficiencies arising from the various sides of the market/platform in seeking exemption from prohibition under Article 101(3).

This is especially pertinent in the context of exclusive rights arrangements which give rise to partial, rather than full, foreclosure.[926] Where broadcast rights are granted on an exclusive basis for a specified period of time, competitors in the downstream supply of content to viewers will be foreclosed from one side of the market, but will still have some demand from viewers/advertisers on the other side. The extent to which such demand

[923] In the UK, for instance, digital ad spend grew 16.4 per cent in 2015 to £8.61billion and ad spend on social media sites grew 45 per cent to £1.25billion. 'Digital adspend grows at fastest rate for seven years' (Internet Advertising Bureau UK, 14 April 2016) <https://www.iabuk.net/about/press/archive/digital-adspend-grows-at-fastest-rate-for-seven-years> accessed 17 November 2016.
[924] *Cartes Bancaires* (n 57) [53].
[925] *MasterCard* (n 57) [237].
[926] Armstrong and Wright (n 250) 374.

mitigates the foreclosure effects of exclusivity will depend on the level of product differentiation on the viewer/advertiser side(s). The increasing supply of exclusive dramas in particular is likely to mitigate any such effects, assuming that viewers/advertisers will be more likely to regard the various distribution platforms as substitutable in consuming dramas. In this regard, taking into consideration the multi-sided platform nature of pay-TV providers supports the argument that there is a reducing likelihood of anti-competitive foreclosure from exclusive agreements for the supply of premium pay-TV content or services.

6.6.3 Dilution of exclusivity with joint purchasing and sub-licensing

The sharing of rights under joint purchasing and sub-licensing arrangements is emerging as a strategic way in which pay-TV providers and FTA broadcasters alike can collaborate to meet the escalating cost of acquiring sports rights in particular. For example, in 2014, BT and Sky agreed a 4-year deal to split the broadcast rights for live coverage of the inaugural European Rugby Champions Cup and European Rugby Challenge Cup.[927] With only the finals being listed as Group A events under the UK "listing" rules, live coverage of the remainder of these competitions can be broadcast on pay-TV, provided that secondary coverage is offered to FTA broadcasters. Admittedly, the circumstances leading up to this agreement were unique in that Sky and BT had each entered into exclusive agreements for rights to European club rugby before the restructuring of the club game in 2014 (when the European Rugby Cup was replaced by European Professional Club Rugby).[928] However, splitting the rights meant both parties could avoid the time and expense of litigation.

[927] Paul Rees, 'A beginner's guide: the new European Rugby Champions Cup explained' *The Guardian* (11 April 2014) <https://www.theguardian.com/sport/blog/2014/apr/11/beginners-guide-european-rugby-champions-cup> accessed 30 July 2017.

[928] In 2012, Sky renewed its contract with Heineken Cup organisers, the European Rugby Cup. At around the same time, BT reached an agreement with Premiership Rugby in respect of any European games involving its clubs, after the English and French sides announced that they were severing ties with the European Rugby Cup. Ben Rumsby, 'TV giants BT and Sky close to historic deal to share coverage of European club rugby' *The Telegraph* (13 February 2014)

The sharing of sports rights has received a mixed response, particularly at the EU level. This is exemplified by the differing responses of the European Commission and European Courts in the *Eurovision* case.[929] The European Broadcasting Union ("EBU") coordinated a programme exchange system under which EBU members could jointly acquire and share television rights. The European Commission found that the arrangement greatly restricted, if not eliminated, competition between EBU members, and between EBU members and non-EBU members, in respect of the rights to international sporting events in particular.[930] Exemption was granted under Article 101(3) on the basis that the joint negotiations improved purchasing conditions by reducing transaction costs.[931] It was considered that consumers would receive a fair share of the benefit in the form of more and better quality sports programmes than members would otherwise have been able to provide.[932] However, the General Court annulled this decision on the basis that the European Commission was incorrect in finding that the sub-licensing system guaranteed competitors of EBU members sufficient access to the transmission rights for sporting events held by EBU members.[933]

Concerns were similarly raised by the European Commission following the notification of a joint purchasing agreement between Telefónica and Sogecable, relating to the broadcast rights to Spanish First League Football

<http://www.telegraph.co.uk/sport/rugbyunion/10637587/TV-giants-BT-and-Sky-close-to-historic-deal-to-share-coverage-of-European-club-rugby.html> accessed 30 July 2017.

[929] *EBU/Eurovision System* (Case IV/32.150) Commission Decision 93/403/EEC [1993] OJ L179/23.

[930] ibid [49].

[931] ibid [59].

[932] ibid [68].

[933] Judgment of the General Court in Joined Cases T-185/00, T-299/00 and T-300/00 *M6 v Commission, Gestevisión Telecinco v Commission and SIC v Commission.* The decision of the General Court was subsequently upheld by the ECJ. Case C-470/02 P Appeal brought on 23 December 2002 by the European Broadcasting Union against the judgment delivered on 8 October 2002 by the Second Chamber, Extended Composition, of the General Court in Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 [2003] OJ C55/13.

matches for 11 seasons ending in 2009.[934] The case was closed following the merger of Vía Digital and Sogecable.[935] Prior to this, the European Commission considered that the agreement would have foreclosed the Spanish pay-TV market, the success of which (as in many other countries) was said to heavily rely on the live coverage of football matches.[936] Following a Statement of Objections, the parties granted access to the rights to new entrants into cable and digital terrestrial television in Spain, and also allowed competitors to set the prices for pay-per-view matches.[937]

The most notable instance of rights sharing in Australia arguably remains the Content Supply Agreement between Foxtel and Optus in 2002. This provided for the supply of Foxtel channels to Optus for resale on Optus' hybrid fiber-coaxial broadband network until 31 December 2010, and certain pay-TV rights to Austar.[938] It was authorised by the ACCC subject to undertakings.[939] As regards access to content, Foxtel and Austar each undertook to enter into agreements with infrastructure operators who requested to be supplied with Foxtel/Austar pay-TV services, and to supply infrastructure operators of ADSL networks on the same terms in the event that Foxtel/Austar supplied a retail pay-TV service using ADSL.[940] Foxtel also undertook to not acquire the pay-TV

[934] Decision of the Commission of 14 August 2002, referring to Case No COMP/M.2845 *Sogecable/Canalsatélite Digital/Vía Digital* to the competent authorities of the Kingdom of Spain in accordance with Article 9 of Council Regulation No.4064/89.

[935] 'Commission closes its probe of Audiovisual Sport after Sogecable/Vía Digital merger' (European Commission press release IP/03/655, 8 May 2003) <http://webcache.googleusercontent.com/search?q=cache:HwKwXOZaoo4J:europa.eu/rapid/press-release_IP-03-655_en.pdf+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 30 July 2017.

[936] 'Commission withdraws threat of fines against Telefonica and Sogecable, but pursues examination of their joint football rights' (European Commission press release IP/00/1352, 23 November 2000) <http://europa.eu/rapid/press-release_IP-00-1352_en.htm?locale=en> accessed 30 July 2017.

[937] ibid.

[938] 'Breakthrough agreement in subscription television' (Optus media release, 5 March 2002) <https://media.optus.com.au/media-releases/2002/breakthrough-agreement-in-subscription-television/> accessed 8 May 2017.

[939] 'ACCC accepts Foxtel-Optus pay TV deal' (ACCC media release MR279/02, 13 November 2002) <https://www.accc.gov.au/media-release/accc-accepts-foxtel-optus-pay-tv-deal> accessed 8 May 2017.

[940] Asymmetric Digital Subscriber Line is a type of digital subscriber line broadband communications technology that is used for connecting to the Internet.

rights to various shared channels on an exclusive basis,[941] and to supply a percentage of non-affiliated channels.

The expiry of these undertakings was followed by court-enforceable undertakings from Foxtel in connection with the ACCC's approval of Foxtel's proposed acquisition of Austar.[942] The undertakings prohibit Foxtel from acquiring exclusive IPTV rights for or renewing exclusive IPTV arrangements in relation to 62 channels (including a number of movie channels). However, the undertakings do not preclude Foxtel from acquiring exclusive rights to individual sports, which are otherwise subject to the restrictions imposed under the Australian "anti-siphoning" rules. The ACCC considers that by reducing content exclusivity, the undertakings will lower barriers to entry, and promote new and effective competition in metropolitan and regional telecommunications and pay-TV markets. Yet there is little evidence of this in practice.

Granted for an 8-year period, the undertakings will cease to be enforceable in 2020. At this time, Foxtel's ability to acquire exclusive rights to premium non-sport content will be enhanced. This will not necessarily call for additional regulatory intervention in the market, but it should be taken into consideration in the ACCC's review of the proposed takeover of Ten via the special purpose vehicles of Lachlan Murdoch and Bruce Gordon. This would be recommended even if there was more than 3 years until the expiry of the undertakings and despite the fact that the ACCC says it bases its assessment on what a market is likely to look like in the next 2-3 years.[943] As already indicated, a longer-run approach than this is likely to be appropriate in most

[941] This refers to channels broadcast by both Foxtel and Optus prior to the agreements: Antenna, BBC World, Cartoon Network, CNBC, CNN, Disney, National Geographic, RAI, Sky News, Sky Racing, TCM, TVSN, World Movies and ESPN International.

[942] 'Foxtel - proposed acquisition of Austar United Communications Limited' <http://registers.accc.gov.au/content/index.phtml/itemId/1044881/fromItemId/751043?pageDefinitionItemId=86167> accessed 14 August 2017.

[943] ACCC Media Merger Guidelines (n 91) 4.

cases in assessing the market and market power in the premium pay-TV context. It is questionable whether the expiry of the undertakings would call for further regulation. As argued in relation to Sky in the UK, the case for asymmetric regulation is diminished by new entry, particularly by online streaming services (i.e. since 2012, the online streaming landscape has changed dramatically with the entry of Stan and Netflix Australia).

6.7 Conclusions

The structure of the market for exclusive broadcast rights to major sporting events in the UK and Australia is inherently affected by the existence of the UK "listing" rules and the Australian "anti-siphoning" rules. It has been noted how these rules restrict the ability of the owners of rights to listed events to enter into exclusive rights arrangements with pay-TV providers. Such restrictions are particularly pronounced in Australia given the more comprehensive nature of the Australian "anti-siphoning" rules, and the absence of a dual listing regime. The fact that the existing rules discriminate between traditional broadcast television and new media arguably undermines the normative basis for anti-siphoning regulation, namely to keep the coverage of listed events on FTA television. This is exemplified in Australia by Seven's decision to charge viewers to access sports coverage via its app. Anti-siphoning rules therefore also have the potential to undermine the relative investment incentives of FTA broadcasters on the one hand, and traditional pay-TV providers and SVOD platforms on the other.

It is important that anti-siphoning regulation is applied in a technologically-neutral way across available platforms, even if this means extending the scope of such regulation. This calls for something more than the reduction in the threshold for "qualifying services" in the UK under the Digital Economy Act. At the time of the most recent comprehensive review of the Australian "anti-siphoning" rules by the Department of Broadband, Communications

and the Digital Economy in 2010,[944] there was little support for extending the "anti-siphoning" list to new platforms. New media services were then perceived to "remain in their infancy in Australia".[945] An obvious development in this regard is Optus' entry into the supply of live sports coverage via its mobile and broadband services, and acquisition of broadcast rights for cricket and the Premier League. This thesis therefore urges the review of anti-siphoning regulation in both Australia and the UK, and for the focus of such reviews to be on technological-neutrality.

Beyond the scope of anti-siphoning regulation, to the extent that there remains an incentive for rights owners and broadcasters to enter into exclusive rights arrangements, the limits of adopting a quantitative approach to assessing the foreclosure effects and regulation of such arrangements are evident. The European Commission's emphasis on the very existence and duration of exclusivity in the *Football Association* and *KNVB/Sport 7* cases,[946] for instance, undermines the fundamental principle that exclusive rights are not in themselves incompatible with Article 101(1) of the TFEU, by implying that such rights are inherently restrictive of competition. The potential difficulties of this approach are reinforced by suggestions made by former EU Competition Commissioner Mario Monti that exclusivity for a period longer than one season is likely to lead to market foreclosure, and may be justified only if the firm acquiring the rights wishes to enter a new market or to introduce new technology requiring substantial investment.[947] This is significant since the burden of proof in obtaining exemption from prohibition under Article 101(3) shifts to the parties to demonstrate there are no ways less restrictive of competition for achieving the relevant ends. Also, from an

[944] Department of Broadband, Communications and the Digital Economy (n 838).
[945] ibid 31.
[946] *Football Association* (n 834); *KNVB/Sport 7* (n 840). The European Commission has similarly considered the existence of exclusive movie rights to be restrictive of competition. *Vivendi/Canal+/Seagram* (Case No COMP/M.2050) OJ L(2000)2985.
[947] Mario Monti, 'Sport and Competition' (Speech 00/152, Brussels, 17 April 2000) <http://europa.eu/rapid/press-release_SPEECH-00-152_en.htm> accessed 8 May 2017.

advertising revenue perspective, a period of one season (which could be less than a year depending on the event), is unlikely to reflect the frequency with which television advertising budgets are allocated, giving rise to disparity in the timeframes over which the viewer-side and advertising-side are assessed.

The European Commission's use of commitments to limit the duration of exclusivity represents an attempt to balance the promotion of new entry and support for technological progress without seriously distorting competition and damaging market structure.[948] However, the period of exclusivity is misleading, for what is important is the extent to which parties are locked in.[949] In the premium pay-TV context, this requires consideration of the wider market conditions and exclusivity as characteristic of effective competition. Subiotto and Graf go so far as to propose a presumption in favour of the validity of exclusive broadcast licences under EU competition law.[950] They suggest that the duration and scope of exclusivity should be subject to more detailed consideration only where there are high market shares.[951] This sounds appropriate provided the approach that is adopted in determining market shares reflects the dynamic nature of competition *for* the market. This includes adopting a longer-run approach in assessing the possible foreclosure effects of exclusivity in the light of the increase in multi-platform diversification, direct-to-viewer distribution, and the sharing of rights (whether by commercial negotiation or as a requirement of regulation).

[948] Nikos T Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors* (Kluwer Law International, 2006) 168-169.
[949] Aghion and Bolton (n 797) 389.
[950] Thomas Graf and Romano Subiotto, 'Analysis of the Principles Applicable to the Review of Exclusive Broadcasting Licences under EC Competition Law' (2003) 26(4) *World Competition* 589.
[951] ibid.

CHAPTER 7

ACCESS REGULATION AND INDISPENSABILITY ANALYSIS OF PREMIUM PAY-TV

7.1 Introduction

The competitive access problem in the digital era has shifted from networks to content, giving rise to the so-called "premium content bottleneck". Issues of access to content and carriage in the supply of premium pay-TV are inherently interrelated. Securing access to the rights to broadcast premium content is of little commercial value without access to the physical means by which to distribute such content to viewers, and vice versa. The interrelationship between content and carriage is reinforced, in particular, in the UK by the vertical integration of Sky (and more recently BT), and in Australia by Telstra's 50 per cent stake in Foxtel (and Telstra's forward integration into the retail distribution of pay-TV services). Competing at both the wholesale and retail levels may provide firms with the ability and incentive to act in a manner that adversely affects competition in those or related markets. This may take the form of an outright or constructive refusal to provide third parties with access to content and/or technical pay-TV facilities under their control.[952]

Regulatory responses in the UK and Australia have been to operate sector-specific access regulation alongside the enforcement of the prohibitions on refusal to supply in Chapter II of the CA1998/Article 102 of the TFEU and Section 46 of the CCA, respectively. This includes the provision for access regulation in the UK under the CA2003, and in Australia the general access regime in Part IIIA of the CCA for bottleneck infrastructure and the telecommunications access regime in Part XIC of the CCA. It will be suggested

[952] For the purpose of this chapter, "technical pay-TV facilities" refers to transmission networks and other access technologies used to supply audio-visual content to viewers.

that the residual role for Section 46 is likely to become more significant with the proposed amendments to the access regimes in the Competition Policy Review Bill and the implementation of the new Section 46. Nevertheless, the prohibitions on refusal to supply in both countries typically fulfil a residual role where the sector-specific access regimes do not apply.

A key issue that arises at the intersection between general competition law and sector-specific access regulation in this context is whether premium content and/or technical pay-TV facilities constitute "essential facilities". Denying third parties access to an essential facility represents a subset of refusal to supply. Mandating access to premium content/technical pay-TV facilities on "fair, reasonable and non-discriminatory" terms assumes that access is indispensable for downstream competition in the retail supply of premium content to viewers. Evens, Iosifidis and Smith are amongst proponents of the systematic application of the "essential facilities" doctrine to all premium content and all delivery platforms.[953]

At a time when the role for sector-specific access regulation is arguably diminishing, the question of the appropriateness of applying the concept of "essential facilities" in the premium pay-TV context becomes increasingly significant. It will inherently determine the scope of the residual role for the regulation of access under Article 102 of the TFEU and Section 46 of the CCA. Based on regulatory and technological developments relating to the supply and consumption of premium pay-TV in the digital era, this chapter questions the relevance of the concept of indispensability and, in doing so, challenges the scope for legitimately regulating premium content or technical pay-TV facilities as essential facilities.

[953] Evens, Iosifidis and Smith (n 368) 545.

7.2 Monopoly Problem and the Concept of Essential Facilities

Access issues arise in industries, like pay-TV, where there are facilities that exhibit natural monopoly characteristics which may be uneconomical to duplicate.[954] A natural monopoly exists where demand for a product or service can be fulfilled at a lower cost by a single firm than by multiple firms.[955] Standard natural monopolies include electricity transmission grids, gas pipelines and telephone networks. Natural monopoly is a sufficient, but not necessary, condition for a facility to be deemed as essential.[956] Under the "essential facilities" doctrine, upstream inputs which cannot be easily replicated without significantly increasing rivals' costs are regarded as indispensable for downstream competition.

A firm in control of an essential facility may have the ability and incentive to restrict access by third parties. This may entail an outright refusal to supply, or a constructive refusal to supply where access is offered but on uncompetitive terms.[957] However, imposing a duty to supply does not necessarily ensure a more competitive outcome (and potentially risks a less competitive outcome) than that which might otherwise prevail in the absence of regulatory intervention in the market. It is therefore important to ascertain the limited circumstances in which a profit-maximising facility owner may have the ability and incentive to restrict access by third parties.

7.2.1 Incentives for facility owners to restrict access by third parties

A facility owner will not necessarily seek to restrict access by third parties.[958] As a rational, profit-maximising monopolist, a facility owner has an incentive

[954] Hilmer Report (n 36) 239.

[955] William J Baumol, 'On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry' (1977) 67 *American Economic Review* 809, 810.

[956] Stephen King and Rodney Maddock, 'Competition and Almost Essential Facilities: Making the Right Policy Choices' (1996) *Economic Papers* 15, 28.

[957] The expression "refusal to supply" is hereafter used to refer generically to both outright and constructive refusals to supply, unless stated otherwise.

[958] James R Ratner, 'Should there be an Essential Facility Doctrine?' (1988) 21 *University of California Davis Law Reports* 327, 348-349; Andrew N Kleit and David Reiffen, 'Terminal Railroad Revisited:

to earn a monopoly profit and this may be achieved by increasing the price that is charged to access seekers.[959] High prices may discourage some access seekers but will not necessarily be anti-competitive. Where such pricing gives rise to a constructive refusal to supply, the facility owner may argue efficiencies as a legitimate business justification. However, the access price that is charged is likely to be limited to some extent by the facility owner's incentive to promote the use of its facility by third parties (e.g. where it lacks the interest and/or expertise to develop new applications for the facility).

Where the facility owner is vertically-integrated, it may have a particular incentive to refuse to supply third parties. Where the facility owner also competes in a downstream market against access seekers, the potential to charge monopoly prices may be exceeded by the incentive to deny downstream competitors access to the facility, or to offer access on terms that discriminate against them.[960] A rational, profit-maximising facility owner would not be expected to exclude access seekers which are more efficient than itself in the vertically-related market because such firms may earn monopoly profit for it.[961] Also, where a facility owner's integrated operations are inefficient, this is likely to encourage new entry, without any need for regulatory intervention in the market.[962]

Proponents of the Chicago School would argue that there is a single monopoly profit that a facility owner can earn.[963] On this basis, the motives for a monopolist to vertically-integrate would be restricted to economic ones based on reducing transaction costs and realising efficiencies. This limits the

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Foreclosure of an Essential Facility or Simple Horizontal Monopoly?' (1990) 33 *Journal of Law and Economics* 419, 420.

[959] David J Gerber, 'Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"' (1988) 74 *Virginia Law Review* 1069, 1084.

[960] Ratner (n 958) 350.

[961] ibid.

[962] Gerber (n 959).

[963] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 229.

circumstances in which a vertically-integrated facility owner would have the incentive to refuse access to where it is prevented from earning a monopoly profit in the market in which it owns the facility, such as by industry regulation.[964] However, post-Chicago School economic theory shows that the concept of a single monopoly profit does not always hold true.

The "single monopoly profit" theory assumes: (i) a monopoly supplier whose position is protected by barriers to entry; (ii) an unregulated monopoly; (iii) perfect competition in the downstream output market; and (iv) the technology for producing the output involves using all of the inputs in fixed proportions.[965] Where these conditions do not hold true, it may be profitable to refuse to supply. However, the refusal to supply will not necessarily be anti-competitive. It may be competitively neutral or pro-competitive, especially when the interests of consumers in dynamic competition are assessed over the longer-term. This means that in most cases vertical integration may be motivated by monopoly power, economic efficiency or a combination of the two.[966] In imposing a duty to supply, the net competitive effects on the market need to be assessed on the facts of the case.

7.2.2 Competitive effects of imposing a duty to supply

Imposing a duty to supply under general competition law or sector-specific legislation marks a departure from the fundamental, albeit not absolute, principles of private property and freedom of contract.[967] Restricting the freedom of dominant firms to choose with whom (and with whom not) to deal and on what terms, also represents a qualification of the competition law principle that there is no general duty to deal, even in respect of dominant firms. This is said to be justified by the policy objective of enhancing consumer

[964] Ratner (n 958) 354.
[965] Michael H Riordan and Steven C Salop, 'Evaluating Vertical Mergers: A Post-Chicago Approach' (1995) 63 *Antitrust Law Journal* 513, 517.
[966] ibid.
[967] Hilmer Report (n 36) 242.

welfare through vigorous competition.[968] Vigorous competition ensures that firms retain incentives to operate efficiently and innovatively.[969] However, as already identified, the definition of vigorous or effective competition varies between markets.

In innovation-driven industries such as pay-TV, imposing a duty to supply may encourage free-riding by new entrants. This may dampen the investment incentives of facility owners and their competitors,[970] contrary to the longer-term interests of consumers in dynamic competition.[971] A duty to supply may also be imposed on terms that do not protect or promote competition. For instance, where a monopolist is required to deal and does so at a price that reflects the monopoly price, downstream competition may be excluded in any event.[972]

As already indicated, monopoly pricing may give rise to a constructive refusal to supply. However, such pricing may not be identifiable in emerging markets, in which appropriate counterfactuals are especially difficult to determine. It will also be pertinent for determining the appropriate terms of access which, in any given case, is typically no mean feat for courts or regulators, but particularly in rapidly changing, innovation-driven industries. It will be seen how this reinforces the broader question of the respective roles for

[968] Jonathan Hooks, Donna Patterson and Robert Pitofsky, 'The Essential Facilities Doctrine Under United States Antitrust Law' (2002) 70 *Antitrust Law Journal* 443, 452.
[969] ibid.
[970] See, Joshua S Gans and Philip Williams, 'Efficient Investment Pricing Rules and Access Regulation' (1999) 27 *Australian Business Law Review* 267; Joshua S Gans and Philip Williams, 'Access Regulation and the Timing of Infrastructure Investment' (1999) 75 *Economic Record* 127; Stephen King, 'Pricing for Infrastructure Access' (1997) 4 *Competition and Consumer Law Journal* 203.
[971] The negative effects of imposing a duty to supply on investment incentives is disputed. See, for example, Cyril Ritter, 'Refusal to Deal and "Essential Facilities": Does Intellectual Property Require Special Deference Compared to Tangible Property?' (2005) 28(3) *World Competition* 281.
[972] Ravi P Kewalram, 'The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy' (1994) 2 *Trade Practices Law Journal* 188, 203.

competition regulators and industry-specific regulators, and the scope for self-regulation, in media markets in the digital era.

7.3 Elements of the "Essential Facilities" Doctrine

The "essential facilities" doctrine originates from the US,[973] where it renders a unilateral refusal to deal subject to the prohibition on monopolisation and attempts to monopolise in Section 2 of the Sherman Act 1890.[974] This represents a departure from the general principle of freedom to deal that was confirmed by the US Supreme Court in *Colgate*.[975] There is no absolute freedom to deal.[976] However, in the absence of purpose to create or maintain a monopoly, a private trader is free to "exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell."[977] The concept of "essential facilities" has been embraced, to some extent, in the enforcement of UK/EU and Australian competition law, but in manners that are distinguishable from the US "essential facilities" doctrine.

7.3.1 US origins of the "essential facilities" doctrine

The "essential facilities" doctrine is not explicitly referred to by the US Supreme Court. However, lower courts have applied it in a variety of contexts,

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[973] *United States v Terminal Railroad Association of St Louis* 224 US 383 (1912). The existence of the US "essential facilities" doctrine is disputed. See, Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1989) 58(3) *Antitrust Law Journal* 841.

[974] Section 2 of the Sherman Act 1890 makes it unlawful for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations". The US "essential facilities" doctrine may form the basis of a monopolisation claim, as opposed to an independent cause of action. *Kramer v Pollock-Krasner Found* 890 F Supp 250 (1995) [257].

[975] *United States v Colgate & Co* 250 US 300 (1919). There is debate as to whether the "essential facilities" doctrine represents an exception or a separate principle to the freedom to deal. Leigh Hancher, 'Case Note on *Oscar Bronner*' (1999) *Common Market Law Review* 1289.

[976] For instance, the refusal in *Aspen* involved discontinuing a "voluntary (and thus presumably profitable) course of dealing which suggested a willingness to forsake short term profits to achieve an anticompetitive end." *Aspen Skiing v Aspen Highlands Skiing* 472 US 585 (1985), referred to in *Verizon Communications Inc v Law Offices of Curtis v Trinko* 540 US 398 (2004) 880.

[977] *Colgate* (n 975) 307.

including in the telecommunications sector in *MCI Communications*.[978] This case incidentally sets out the prevailing elements of the US "essential facilities" doctrine. The Seventh Circuit Court of Appeals required a monopolist telecommunications provider to allow access to its local service network by competitors in long-distance services. It determined that the existence of an essential facility depends on whether: (i) access is essential to enter the market; (ii) the monopolist controls the facility; (iii) the competitor could practically or reasonably duplicate the facility; and (iv) it is feasible for the monopolist to provide access to the facility (such as where there is a history of access).[979] The US Supreme Court appears unresponsive to the question as to whether the "essential facilities" doctrine applies, including in the telecommunications context. For instance, in *Verizon v Trinko*,[980] it stated there was no need to recognise or repudiate it.[981]

With respect to the scope of the US "essential facilities" doctrine, it considers whether it would be impractical for a new entrant to duplicate a facility under the so-called "private profitability" test. If it is privately profitable for a new entrant to build its own facility, even at a higher cost, then the doctrine will not be invoked. The rationale being that, if a potential entrant can practicably and reasonably feasibly build its own facility, then the incumbent faces the prospect of actual entry. This should make it more likely that the incumbent will offer services to entrants at a lower cost than they would otherwise face if they were to build their own facilities. The aim is to preserve investment incentives by minimising the chilling effect of imposing a duty to supply.[982]

[978] *MCI Communications v AT&T Co* 708 F 2d 1081, 1132-1133 (7th Cir 1983).
[979] ibid; *Aspen* (n 976).
[980] *Trinko* (n 976).
[981] ibid [IV[7]]. On the facts of this case there was provision for access under the Telecommunications Act 1996.
[982] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press 2016) 540.

7.3.2 Concept of essential facilities in the context of Article 102 of the TFEU

In the absence of a general duty to deal, occupying a dominant position does not disentitle an undertaking from protecting its commercial interests.[983] A dominant firm is entitled to take such reasonable steps as it deems appropriate to protect such interests.[984] However, a refusal to supply in the UK may constitute an abuse of dominance under the Chapter II prohibition of the CA1998 or Article 102 of the TFEU where there is an effect on trade between Member States.[985] Following *Commercial Solvents*,[986] Article 102 will be infringed where a dominant firm refuses to supply an existing customer with a raw material, to reserve such material for manufacturing its own derivatives, where the refusal to supply risks eliminating all competition on the part of that customer.[987] Terminating an existing supply arrangement is more likely to be considered abusive since a previous course of dealing suggests no risk to the supplier in continuing to supply.[988] A previous course of dealing may also be relevant in assessing whether a refusal to supply is justified on efficiency grounds.[989]

In the context of access to communications infrastructure, Articles 102(b) and 102(c) are especially pertinent. These provisions prohibit the abuse of a dominant position by limiting production or applying dissimilar conditions to equivalent transactions, respectively. The latter is interpreted as prohibiting the owner of infrastructure from denying access in order to suppress competition, at least where capacity is available and a reasonable price is

[983] *United Brands* (n 32) [189] (UK/EU); *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13; (2001) 205 CLR 1 [61] (AU).
[984] ibid.
[985] The focus in this section is on Article 102 as it is in relation to this provision that the general principles on refusals to supply for the purposes of UK/EU competition law originate.
[986] Joined Cases 6/73 & 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* (1974) ECR 223; [1974] 1 CMLR 309.
[987] ibid [25].
[988] European Commission Guidance on Article 102 (n 40) para 84.
[989] ibid para 90.

being offered for access.[990] This was enunciated by the European Commission in *Sealink Harbours*,[991] its first published decision to expressly refer to essential facilities.

Sealink was the port authority at Holyhead Harbour in Wales and a car ferry operator. Its car ferry service faced competition from B&I, an Irish ferry operator, whose berth was in the narrow harbour mouth. Sealink altered its schedule of sailing times in such a way that B&I's loading was interrupted more frequently. This operated to the detriment of B&I and in favour of Sealink's own services. The European Commission found that, as a dominant harbour owner, Sealink was not free to discriminate in favour of its own car ferry services.[992] It held that a dominant firm which controls and uses an essential facility will infringe Article 102 if it refuses competitors access, or offers access only on terms less favourable than those which it gives its own services, unless there is an objective justification for the refusal.[993]

In a second case involving Sealink,[994] essential facilities were defined as facilities "without access to which competitors cannot provide services to their customers."[995] In this case, the European Commission concluded that, by refusing access to the port of Holyhead on reasonable and non-discriminatory terms to Sea Containers (a potential competitor in the market for ferry services between Britain and Ireland), Sealink abused its dominant position in the market for port services. For the purposes of imposing interim measures to avoid any danger of serious and irreparable harm to Sea Containers, it was necessary to show that Sea Containers could not operate a commercially viable service from the port as a result of Sealink's conduct and

[990] *London European Airways v Sabena* [1989] 4 CMLR 662.
[991] *B&I Line Plc v Sealink Harbours Ltd* [1992] 5 CMLR 255.
[992] ibid 267.
[993] ibid 265-266.
[994] Commission Decision 94/19/EC *Sea Containers v Stena Sealink* [1994] OJ L15/8.
[995] ibid [66].

Sea Containers would therefore have been unable to enter the market.[996] As the parties subsequently agreed the terms of access, the European Commission was not required to determine whether Sea Containers would suffer any such harm.

In the absence of an EU "essential facilities" doctrine, the limited circumstances in which access to a facility may be mandated under Article 102 within the context of a refusal to supply were set out by the ECJ in *Oscar Bronner*.[997] Mediaprint established a nationwide system for distributing newspapers early in the morning to subscribers' homes. Oscar Bronner argued the system should be treated as an essential facility because it lacked the economic ability to establish a competing one. It also alleged that Mediaprint's refusal to distribute Bronner's newspapers constituted an abuse of dominance. By way of a preliminary ruling, the ECJ held that it was necessary to establish that: (i) the refusal was likely to eliminate all competition in the downstream market (the market for daily newspapers) on the part of the person seeking access;[998] (ii) the refusal was incapable of being objectively justified; (iii) access was indispensable to carrying on that person's business; and (iv) there was no actual or potential substitute.[999]

On the facts of the case, it was insufficient that establishing a second home-delivery scheme was not economically viable because of the small circulation of the daily newspaper to be distributed.[1000] It was instead necessary to demonstrate that it was not economically feasible to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by Mediaprint.[1001] The

[996] ibid [79].
[997] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG* (1998) ECR I-7791; [1999] 4 CMLR 112.
[998] ibid [38].
[999] ibid [41].
[1000] ibid [46].
[1001] ibid.

test is an objective one, requiring that it is extremely difficult for any other undertaking (not just the access seeker) to compete.[1002] Therefore, the issue is whether the refusal to supply will lead to the monopolisation of a downstream market.

The significance of the condition of indispensability within the context of refusals to supply intellectual property rights was confirmed in *IMS Health*.[1003] In this case, the ECJ laid down three cumulative conditions for a refusal by a copyright owner to allow access to a product/service that is indispensable for carrying on a particular business to be abusive.[1004] Firstly, the refusal prevents the emergence of a new product for which there is potential consumer demand. Secondly, the refusal is unjustified and, thirdly, it will exclude any competition on a secondary market. It is in the technology sector that these conditions have faced particular scrutiny, with issues concerning intellectual property rights being fundamental to the issue of interoperability.

The "new product" criterion in *IMS Health* implies a stricter approach towards mandating the supply of inputs which are the subject of intellectual property rights. This is pertinent to this thesis, not least in terms of reinforcing the distinction between premium sport and non-sport content for rights owners to monetise their content and for regulatory purposes. There is growing interest in the role of intellectual property right protection in respect of the coverage of live sporting events.[1005] It was confirmed in the *Murphy* case that whilst matches themselves are not deemed subject to copyright,[1006] copyright material in football broadcasts remains important to protect rights

[1002] Opinion of A-G Jacobs in Case C-7/97 delivered on 28 May 1998 [66].
[1003] Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039.
[1004] ibid [38].
[1005] See, Raymond Boyle, 'Copyright, Football and European Media Rights' (CREATe Working Paper 2015/09, November 2015) <http://www.create.ac.uk/publications/copyright-football-and-european-media-rights/> accessed 26 August 2017.
[1006] Joined Cases C-403/08 and C-429/08 *FA Premier League v QC Leisure and Karen Murphy v Media Protection Services Limited* [2011] ECR I-09083 [96].

holders.[1007] Intellectual property law does not grant copyright protection to sporting events as a whole, but rather the broadcast of such events.[1008] As the nature of televising sporting events changes, more questions are likely to arise regarding the applicability of this general principle, and the intersection between intellectual property law and general competition law (and hence the ability of rights owners to monetise their content).[1009]

7.3.3 Essential facility considerations in applying Section 46 of the CCA

In the absence of an "essential facilities" doctrine as such in Australia, a refusal to supply may fall within the prohibition on the misuse of market power in Section 46 of the CCA. This does not impose a general duty to supply on facility owners.[1010] Given the need under the former Section 46 to establish that the firm refusing access was a corporation with a substantial degree of market power which, by refusing access, was taking advantage of such power for one or more of the proscribed purposes, there have been few successful cases.[1011] However, the introduction of the "purpose and effects" test in the new Section 46 would appear to increase the scope for third parties to secure access to facilities under Section 46.

7.4 Concept of Essential Facilities in the Premium Pay-TV Context

Consideration of the essential facility requirements of indispensability and preventing the emergence of a new product in the premium pay-TV context reinforces questions about the competitive relationship between traditional

[1007] ibid.
[1008] Oles Andriychuk, 'The Legal Nature of Premium Sports Events: "IP or not IP- That is the Question"' in Blackshaw, Cornelius and Siekmann (n 20) 156.
[1009] For example, the practical implications of the ECJ's statement in *Magill* that "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct." Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-00743 [50].
[1010] For instance, in *Melway*, the HCA held that a firm with substantial market power is not legally obliged to appoint new wholesale distributors (and non-price vertical restraints in distribution can promote interbrand competition). *Melway* (n 983).
[1011] *Queensland Wire* (n 471); *NT Power Generation v Power and Water Authority* (2004) 219 CLR 90, [2004] HCA 48 [72].

pay-TV and new media. Differing issues arise in relation to premium sport on the one hand, and premium movies and drama on the other. This supports the distinctions made earlier in the thesis between premium sport and non-sport content. The shift in the competitive access problem in the digital era from CAS technology to APIs and content rights gives rise to the so-called "premium content bottleneck".[1012] It is argued, however, that the case for treating premium content (especially non-sport content) as an essential facility remains arguably unconvincing.

7.4.1 Whether premium content is indispensable for pay-TV competition

The question as to whether access to premium content is indispensable for downstream competition has arisen at the EU level in relation to premium sport and 3G mobile technology. In its inquiry in 2005 into the provision of sports content over third-generation ("3G") mobile networks,[1013] the European Commission found that access to sports rights was not indispensable to 3G mobile operators in the development of 3G network services. This finding was perhaps unsurprising given the relative infancy, at the time of the inquiry, of sports coverage on mobile platforms. Nevertheless, it is supported by the number of mobile operators that have launched 3G (and subsequently fourth-generation) services, and continue to compete aggressively in the retail supply of services to consumers. Interestingly, in finding that television and 3G content services form separate markets,[1014] the European Commission did not define television or 3G content services. It is

[1012] Pablo I Colomo, *European Communications Law and Technological Convergence: Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications* (Kluwer Law International 2012) 81.

[1013] 'Concluding Report on the Sector Inquiry into the Provision of Sports Content over Third Generation Mobile Networks' (European Commission, 21 September 2005) <http://ec.europa.eu/competition/sectors/media/inquiries/final_report.pdf> accessed 26 August 2017.

[1014] 'On the Preliminary Findings of the Sector Inquiry into New Media (3G): Issues Paper' (European Commission, May 2005) 22 <http://ec.europa.eu/competition/sectors/media/inquiries/issuespaper.pdf> accessed 26 August 2017.

therefore argued here that it is not at all clear that without access to sports rights downstream competition in the retail supply of pay-TV services would be eliminated.[1015]

The case for regarding premium movies and drama as indispensable is arguably even weaker. Notably, Ofcom does not appear to consider drama to be indispensable.[1016] In its recent movie market investigation, Ofcom likens dramas to soap operas. On the basis of being widely available on FTA television, it finds that dramas are unlikely to be a primary driver of pay-TV subscriptions.[1017] The implication of this finding that premium drama is unlikely to be indispensable to the development of pay-TV is welcomed. At the same time, the distinction Ofcom continues to draw between premium sport and movies on the one hand, and drama on the other, fails to acknowledge the significance of the findings in the thesis on the rise of premium drama with the growth of SVOD. This arguably reinforces the case for reassessment of how premium content is defined. The significance of this lies, for the purpose of this thesis, in the potential implications for the assessment of the market and the exercise of market power by traditional pay-TV providers.

7.4.2 New product criterion and definition of a separate downstream market

Applying the concept of essential facilities relies on the existence of a separate downstream market, so much will depend upon how the relevant market is defined. In the sport context, for instance, there is the question of whether mobile coverage (real-time or near-real-time in highlight format) and video-streaming are to be defined as separate product markets. If so, the broadcaster loses its important right of exclusive operation because parallel

[1015] Pablo I Colomo, 'Saving the Monopsony: Exclusivity, Innovation and Market Power in the Media Sector' (College of Europe research paper 7/2006) 19 <https://www.coleurope.eu/study/european-legal-studies/research-activities/research-papers-law> accessed 26 August 2017.
[1016] Ofcom (n 1) para A2.10.
[1017] ibid.

commentary and video-streaming are considered an indivisible part of the intellectual property rights in sports broadcasts.[1018] As viewers can increasingly choose between different kinds of commentary, the same could at some point apply to video-streaming.

The position of the ECJ in *IMS Health* on the "new product" criterion would appear, in an era of multi-media firms and bundling, to fortunately restrict the scope for applying the concept of essential facilities in the premium pay-TV context. Advocate General Tizzano interpreted the "new product" criterion broadly by presupposing the possibility of applying the concept even where a facility owner already operates in the market for the new product.[1019] The refusal to grant a licence was deemed to be abusive only if the requesting firm does not wish to limit itself to duplicating the products already offered on the secondary market by the owner of the intellectual property right:

> but intends to produce goods or services of a different nature which, although in competition with those of the owner of the right, answer specific consumer requirements not satisfied by existing goods or services.[1020]

The ECJ adopted a stricter approach that limits the application of the "essential facilities" doctrine to situations where the owner does not operate on the secondary market and hence does not produce the new product:[1021]

[1018] Oles Andriychuk, 'Whether the European Model of Essential Facilities Doctrine Might be Applied to the Contemporary Telecasting of Premium Sports Content?' in Blackshaw, Cornelius and Siekmann (n 20) 111.
[1019] ibid 112.
[1020] Opinion of A-G Tizzano in Case C-418/01 delivered on 2 October 2003 [62].
[1021] Oles Andriychuk, 'Sports Broadcasting Rights in the Digital Epoch: Balancing between Traditional (TV) and Alternative (3G) Subjects of the Market from the Perspective of the European Competition Law' in Blackshaw, Cornelius and Siekmann (n 20) 100.

> [T]he refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.[1022]

Aside from the fact that the ECJ's decision takes precedence, the stricter approach adopted by the ECJ would appear to be preferable in the premium pay-TV context, in the light of the prevalence of vertical integration, for instance. From a market definition perspective, it also appears desirable given the identified risk of markets being defined unduly narrowly. It has been suggested that this is particularly likely to be the case within the context of premium drama given the possibility of markets being defined for individual series. The welcomed effect of this approach is to further limit the scope for mandating the supply of premium content under the essential facilities concept as a subset of refusal to supply.

7.5 Sector-Specific Access Regulation in the UK and Australia

Whilst the UK and Australia both operate sector-specific access regimes, the approaches to regulating the exercise of control over communications infrastructure differ, most notably in terms of the level of prescription. Regulation of access to communications infrastructure in the UK is subject to the EU regulatory framework for electronic communications ("EU Regulatory

[1022] *IMS Health* (n 1003) [49].

Framework").[1023] This establishes a harmonised framework for the imposition of access-related measures throughout the EU in respect of electronic communications networks.[1024] By contrast, under Part IIIA and Part XIB of the CCA in Australia, the emphasis is on encouraging commercial negotiation. However, neither approach is without its limitations as regards the ability to respond efficiently and effectively to economic reality in the rapidly changing communications industry.

7.5.1 Access regulation of control over carriage and content in the UK

The UK relies on *ex ante* regulatory measures regarding access to communications infrastructure in the CA2003. This transposes the EU Regulatory Framework, including the Authorisation Directive,[1025] and the Access Directive,[1026] into UK law. Unlike the industry-wide application of similar measures in the US,[1027] access-related measures in the UK apply only in respect of specific broadcasters. Similarly, in relation to access to content, a wholesale must-offer ("WMO") obligation has to date only been imposed on Sky in respect of the wholesale supply of Sky Sports 1 and 2.[1028] This has been based on Sky's control over content and carriage as both a broadcaster and distributor, when satellite was the dominant pay-TV platform in the UK. The significant changes underway in the UK pay-TV industry may not as yet

[1023] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services OJ L(2002)108 ("Framework Directive").
[1024] This refers to systems that enable the transmission of signals containing information of any type by wire, radio, optical or other electromagnetic means.
[1025] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services OJ L(2002)108 (as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 OJ L(2009)337).
[1026] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities OJ L(2002)108 (as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 OJ L(2009)337) ("Access Directive").
[1027] For instance, in the US, any cable operator with 36 or more channels is required to designate channel capacity for commercial use by persons unaffiliated with the operator (with the percentage of channel capacity to be designated increasing with the number of channels). 47 US Code § 532(b)(1).
[1028] Communications Act 2003, s 45(1).

have seriously diminished Sky's position, but they do call into question the appropriateness of the asymmetric nature of the UK/EU regulatory framework in the digital era.

7.5.1.1 Intervention under the EU Regulatory Framework for communications

The substantive standard for market intervention under the EU Regulatory Framework is typically lower than under Article 102 of the TFEU. Application of the EU Regulatory Framework is triggered by the existence of a position of "significant market power". This is defined by reference to the concept of dominance within the meaning of Article 102.[1029] In the presence of significant market power, a national regulatory authority may impose access obligations where "denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest."[1030]

In limited circumstances, access obligations may be imposed irrespective of whether the facility owner has significant market power. Under Article 6(1) of the Access Directive, every operator of a CAS must offer all broadcasters access on a fair, reasonable and non-discriminatory basis.[1031] Member States may determine whether the same obligations should be imposed on operators of Electronic Programme Guides and APIs.[1032] This has been the case in the UK where the BBC and other FTA channels are guaranteed the first five slots of every Electronic Programme Guide in the country, in the same order.[1033]

[1029] Framework Directive (n 1023) art 14.
[1030] Access Directive (n 1026) art 12.
[1031] ibid annex 1, pt 1, para (b).
[1032] ibid art 5(1)(b).
[1033] Communications Act 2003, s 74(2).

7.5.1.2 Enforcing access-related conditions under the Communications Act 2003

The regulatory framework that applies to all electronic communications networks, services and associated facilities in the UK is set out in Part 2 of the CA2003. Pursuant to this, any person to whom Ofcom applies a condition under Section 46 must comply with that condition. Section 45(2) empowers Ofcom to set general conditions and specific conditions. Conditions may only be imposed or modified if Ofcom is satisfied that it is objectively justifiable, non-discriminatory, proportionate and transparent.[1034] Access-related conditions are a form of specific condition, which are authorised under Section 73, for the purpose of ensuring adequate network access within communications infrastructure.[1035] This may include such conditions relating to network access and service interoperability as appear to Ofcom to be appropriate for achieving efficiency, sustainable competition and the greatest possible benefit for end-users of public electronic communications services.[1036]

It is not necessary to establish dominance or significant market power before imposing access-related conditions. This is in contrast to the previous regulatory regime in the Telecommunications Act 1984 under which access control regulation was first imposed on Sky by Ofcom's predecessor, the Office of Telecommunications. Access regulation previously took the form of licence conditions which applied only to operators in a dominant position within the meaning of Article 102 of the TFEU. By a determination in 2000,[1037] Sky Subscribers Services Limited (a subsidiary of Sky plc) was found to be dominant in the market for access control services for digital interactive

[1034] ibid s 47.
[1035] ibid ss 45(5) and 73(1).
[1036] Communications Act 2003, s 73(2). For the definition of "network access", see Communications Act 2003, ss 151(3) and 151(4).
[1037] Decision as to the status of Sky Subscribers Services Limited as a Regulated Supplier in the market for access control services for digital interactive TV services (Office of Telecommunications, 20 June 2000).

television services.[1038] Licence conditions required Sky to provide access control services for interactive services on fair, reasonable and non-discriminatory terms.[1039]

With the repeal of the Telecommunications Act 1984 at the coming into force of the CA2003, as a transitional measure the access-related licence conditions were given continued legal effect by an Access Control Continuation Notice.[1040] This required Sky to supply access control services on fair and reasonable terms, and to not unduly discriminate or show undue preference in relation to the provision of access control services.[1041] Upon the removal of this Notice in 2015, Ofcom decided not to impose replacement conditions.[1042] It acknowledged the importance of the continued ability of third party content providers to access Sky's STB.[1043] It was satisfied, however, that the contractual arrangements in place at that time, and voluntary commitments by Sky to continue to allow broadcasters access on prevailing terms,[1044] ensured that content providers would retain access.[1045]

Sky's willingness to continue to allow access supports the observation made earlier that a dominant firm in control of a facility bearing natural monopoly characteristics may well have incentives to promote its use by third parties.

[1038] ibid paras 7-8.
[1039] Pursuant to Condition 9.7 in Part A of Schedule 1 of Sky's Licence, Conditions 10 to 15 of the same came into immediate effect.
[1040] Continuation Notice to a class of persons defined as the licensee for the purposes of the provision of access control services under paragraph 9 of Schedule 18 to the Communications Act 2003, as set out in 'Review of Sky's Access Control Services Regulation' (Ofcom, 25 July 2013) annex 5 <https://www.ofcom.org.uk/__data/assets/pdf_file/0018/77130/review-sky-access-control.pdf> accessed 3 February 2017.
[1041] ibid 42-46.
[1042] 'Review of Sky's Access Control Services Regulation' (Ofcom, 17 March 2015) <https://www.ofcom.org.uk/__data/assets/pdf_file/0025/57418/ac_statement.pdf> accessed 3 February 2017.
[1043] ibid 48.
[1044] 'Voluntary commitments by Sky UK Limited in relation to the provision of access control services' (Sky UK Limited, 23 April 2015) <https://corporate.sky.com/documents/about-sky/regulatory-information/voluntary-commitments-by-sky-in-relation-to-the-provision-of-access-control-services.pdf> accessed 3 February 2017.
[1045] Ofcom (n 1042) 48.

In this case, Sky would presumably have an interest in encouraging the use of its STB to capitalise on network effects in the midst of the emergence of alternative STB providers. Increasing reliance on Sky's STB could have been detrimental to the consumer interest in dynamic competition by discouraging competitors from investing in competing STBs. It has been suggested, however, that in the digital era the focus of the competitive access problem in pay-TV is shifting from hardware to software and apps.

7.5.1.3 Wholesale must-offer obligation imposed on Sky in 2010-2015

Further to its investigation of the UK pay-TV sector,[1046] in 2010 Ofcom imposed a WMO obligation on Sky to offer Sky Sports 1 and 2 to competing pay-TV retailers on a wholesale basis at prices set by Ofcom.[1047] Underpinning the imposition of the WMO obligation was that the content shown on these channels was indispensable for downstream competition in the retail supply of such content to viewers. The core competition concerns were that Sky deliberately withheld the wholesale supply of its premium sport channels and, in doing so, acted on strategic incentives unrelated to the normal commercial considerations of revenue or profit-maximisation. In 2012, the CAT found Ofcom's core competition concern that Sky was not a willing wholesaler of its sports content to be unfounded.[1048] With an appeal to the UK Court of Appeal, interim arrangements were put in place by the CAT to maintain the WMO obligation in respect of BT Vision, Virgin Media, Top-Up TV and Real Digital.[1049]

[1046] 'Pay TV Second Consultation: Access to Premium Content' (Ofcom, 30 September 2008) <https://www.ofcom.org.uk/__data/assets/pdf_file/0020/40862/condoc.pdf> accessed 3 February 2017.

[1047] Ofcom (n 139).

[1048] Cases 1156-1159/8/3/10 *British Sky Broadcasting Limited, Virgin Media Inc, The Football Association Premier League and British Telecommunications PLC v Office of Communications* [2012] CAT 20 [27].

[1049] Order of the President in Case 1152/8/3/10 (IR) *British Sky Broadcasting Limited v Office of Communications (Interim Relief)* [2014] CAT 17.

In November 2014, the CAT extended the interim arrangements to BT's then newly emerging IPTV YouView service (upon BT undertaking to maintain BT Sport on Sky's platform until the conclusion of Sky's appeal or further order).[1050] It considered that over the "wholly exceptional" time that the appeal was taking, technical developments had rendered the interim relief order largely ineffective as regards BT.[1051] Following the Court of Appeal's decision in February 2014 (which set aside the CAT's 2012 decision),[1052] the issue of whether Sky's wholesale pricing gave rise to specific competition concerns in their own right was remitted back to the CAT. In November 2015, Ofcom decided to remove the WMO obligation on the basis that Sky made channels Sky Sports 1 and 2 available under a number of commercial arrangements with BT, TalkTalk and Virgin Media.[1053] Sky Sports was also available on NowTV which can be accessed on a range of platforms and devices. Notably, the launch of NowTV in 2012 marked the first time that the Sky Movies and Sky Sports channels were unbundled.

However, what the removal of the WMO obligation suggests about Ofcom's approach is inherently called into question by the fact that part of the reasoning behind its removal was that Sky would continue the prevailing supply arrangements. The legitimacy of this in view of market developments, most notably BT's entry into live sports broadcasting in 2010, is questionable. More broadly, it calls into question the appropriateness of the asymmetric nature of WMO obligations. The WMO obligation imposed on Sky enabled BT to opt to provide its sports channels to commercially attractive delivery platforms with large numbers of subscribers (namely Sky and Virgin Media),

[1050] ibid.
[1051] ibid [66].
[1052] *British Telecommunicatons PLC v Office of Communications, British Sky Broadcasting Ltd, The Football Association Premier League, Virgin Media Inc* [2014] EWCA Civ 133.
[1053] 'Review of the Pay TV Wholesale Must-Offer Obligation' (Ofcom, 19 November 2015) <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/76081/Review-of-the-pay-TV-wholesale-must-offer-obligation-.pdf> accessed 3 February 2017.

but not to smaller rivals platforms such as Talk Talk.[1054] This is not to suggest that a WMO obligation should be imposed on BT. Indeed, in *Tiercé Ladbroke*,[1055] the General Court noted that there is no duty to grant a licence to a firm that is not only already present in the market but a market leader. In that case, Ladbroke was not only present but held the largest share of the relevant market (in which the licence holder did not compete).[1056]

Despite securing premium sports rights, BT maintains that high and persistent barriers to effective entry and expansion remain as a result of Sky's larger retail scale (including as a consequence of the bundling of content with telecommunications services).[1057] Nevertheless, the piecemeal approach to such asymmetric regulation inherently raises questions about consistency and the legitimacy of distinguishing between traditional pay-TV providers and new entrants. There is also the need to take into consideration that pay-TV providers increasingly supply bundles of services across the communications sector. Having regard to BT's status as the UK's biggest telecommunications service provider with the largest share of the fixed UK broadband market, the assumption that access to Sky Sports 1 and 2 is indispensable for BT to compete effectively is highly questionable.

7.5.2 Regulation of access to communications infrastructure in Australia

The ACCC is responsible for enforcing the regulatory regimes on access to communications infrastructure in Australia. This includes the national access regime in Part IIIA of the CCA and the telecommunications-specific access regime in Part XIC of the CCA. These is also the telecommunications-specific anti-competitive conduct regime in Part XIB of the CCA. Central to the access

[1054] Evens, Iosifidis and Smith (n 368) 545.
[1055] *Tiercé Ladbroke SA v Commission of the European Communities* [1997] ECR II-923.
[1056] ibid [130].
[1057] 'BT's Response to Ofcom's Discussion Document: "Strategic Review of Digital Communications"' (BT, 8 October 2015) 76 <https://www.ofcom.org.uk/__data/assets/pdf_file/0029/37937/bt.pdf> accessed 3 February 2017.

regimes in Part IIIA and Part XIC is the value of commercial negotiation. As Hitchens notes, dependence on commercial negotiation can be problematic in a market as small and concentrated as Australia.[1058] However, this is not to suggest that a more interventionist sector-specific approach would necessarily produce more efficient outcomes from a consumer welfare perspective. In fact, reform proposals indicate a shift away from this towards greater reliance on regulating refusals to supply access under Section 46 of the CCA.

7.5.2.1 National access regime in Part IIIA of the CCA

Part IIIA of the CCA sets out an administrative access regime under which third parties may seek access to nationally significant infrastructure. The objects of the regime include to "promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets."[1059] The introduction of the regime followed a recommendation by the Hilmer Review in 1993,[1060] that a new legal regime should be established under which firms can access specified essential facilities. This was considered necessary because of the perceived reluctance and/or inability of the courts to engage in access pricing,[1061] in addition to the perceived limitations of Section 46.[1062]

Declaration gives rise to an enforceable right to negotiate the terms and conditions of access to the declared service with the relevant service provider. Where the service provider and access seeker cannot agree such terms and conditions, either party may request for the ACCC to arbitrate the dispute. A

[1058] Hitchens (n 315) 218.
[1059] Competition and Consumer Act 2010, s 44AA(a).
[1060] Hilmer Report (n 36).
[1061] ibid 243-244.
[1062] ibid 186.

service may be "declared" where the criteria in Section 44G(2) of the CCA are satisfied:

> (a) access would promote a material increase in competition in a market other than the market for the service;
> (b) it would be uneconomical for anyone to develop another facility to provide the service;
> (c) the facility is of national significance;
> (e) access is not already the subject of an effective access regime; and
> (f) access would not be contrary to the public interest.

As the above declaration criteria indicate, the national access regime is based on the concept of a natural monopoly, bottleneck facility. Section 44G(2)(b) concerns whether a facility exhibits natural monopoly characteristics (i.e. it would be uneconomical for anyone to develop another facility to provide the service). Section 44G(2)(a) addresses whether a facility that exhibits natural monopoly characteristics is also a bottleneck facility (i.e. access would promote a material increase in competition in a market other than the market for the service). This reflects the observation of the Hilmer Committee that some facilities exhibiting such natural monopoly characteristics are essential facilities in the sense that access is required for third parties to compete effectively in upstream or downstream markets.[1063]

In 2013, the Productivity Commission reported on its review of the national access regime.[1064] It recommended the amendment of Section 44G(2)(a) to become a comparison of competition with and without access on reasonable

[1063] Hilmer Report (n 36) 240.
[1064] 'National Access Regime: Productivity Commission Inquiry Report No.66' (Commonwealth of Australia, 25 October 2013) <http://www.pc.gov.au/inquiries/completed/access-regime/report/access-regime.pdf> accessed 13 August 2017.

terms and conditions through declaration.[1065] It also recommended the amendment of Section 44G(2)(b) to where total foreseeable market demand over the declaration period could be met at least cost by the facility.[1066] "Total market demand" is defined as including the demand for the service under application, as well as the demand for any substitute services provided by facilities which serve that market.[1067] The assessment of costs is meant to include an estimate of any production costs incurred by the infrastructure service provider from coordinating multiple users of its facility.[1068]

This recommendation is in contrast to the HCA's interpretation of Section 44G(2)(b) in 2012 in the *Pilbara Infrastructure* case,[1069] to require the application of a "private profitability" test (which, as already noted in the US context, depends on it not being profitable for anyone else to develop the facility). The HCA identified three possible approaches to interpreting the expression "uneconomical for anyone to develop another facility to provide the service". Under the "natural monopoly" approach, the question is whether the facility "can provide society's reasonably foreseeable demand for the relevant service at a lower total cost than if it were to be met by providing two or more facilities."[1070] The "net social benefit" approach questions whether "for a likely range of reasonably foreseeable demand for the services provided by means of the [facility], it would be more efficient, in terms of costs and benefits to the community as a whole, for one [facility] to provide those services rather than more than one."[1071] The "private profitability" approach directs attention to "whether any person (including the incumbent operator of the facility to which access is sought) would find it

[1065] ibid 33.
[1066] ibid.
[1067] ibid.
[1068] ibid.
[1069] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.
[1070] ibid [79].
[1071] ibid [80], citing *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2; (2001) 162 FLR 1, 32 [137].

profitable to establish a second or competing facility."[1072] The HCA's adoption of this approach suggests closer alignment with the US approach in *MCI Communications*.[1073]

Nevertheless, the Federal Government of Australia supports the Productivity Commission's recommendations regarding Sections 44G(2)(a) and 44G(2)(b).[1074] Pending amendment of the CCA, apparent inconsistency in policy direction also arises in relation to Section 44G(2)(a), following the recent decision of the ACT in *Application by Glencore Coal Pty Ltd*.[1075] This case concerned an increase in port charges at the newly privatised Port of Newcastle, after it was acquired by Port of Newcastle Operations Pty Limited. Glencore Coal Pty Ltd applied for declaration of the shipping channel service at the port to limit future increases in port charges. It was not disputed that the shipping channels were a natural bottleneck monopoly and access was necessary for the export of coal from the Hunter Valley.[1076] In overturning the decision of the Commonwealth Treasurer to not make the declaration, the ACT found it sufficient for it to be shown that having enforceable rights of access to the relevant service would promote a material increase in competition in a dependent market compared to not having any such rights.[1077] This appears to lower the threshold for access seekers.[1078]

[1072] ibid [81].
[1073] *MCI Communications* (n 978).
[1074] 'Australian Government response to the Productivity Commission and Competition Policy Review Recommendations on the National Access Regime' (Commonwealth of Australia, 24 November 2015) 2-3 <https://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20National%20Access%20Regime/Downloads/PDF/Govt_response_NAR.ashx> accessed 13 August 2017.
[1075] *Application by Glencore Coal Pty Ltd* [2016] ACompT 6.
[1076] ibid [7].
[1077] ibid [121].
[1078] This decision is the subject of an appeal to the FCA. *Port of Newcastle Operations Pty Ltd CAN 165 332 990 v The Australian Competition Tribunal & Anor*, 14 July 2016.

7.5.2.2 Relationship between Section 46 and Part IIIA of the CCA

As a general principle, the operation of Section 46 and, more broadly, Part IV of the CCA, is not affected by Part IIIA of the CCA.[1079] The CCA does not state that Section 46 does not apply to cases that fall within the scope of Part IIIA. However, the Hilmer Committee indicated a residual role for Section 46 in regulating access to communications infrastructure only where Part IIIA does not apply.[1080] Whilst it was also noted that Part IIIA should apply sparingly, to "key sectors of strategic significance to the nation."[1081] Together with electricity transmission grids and railway tracks, the Hilmer Committee referred to telecommunications networks as the key infrastructure assets that it envisaged as being potentially subject to the access regime.[1082]

Albeit residual, the role for Section 46 is not confined to a limited set of circumstances.[1083] Section 46 will apply to services that do not satisfy the criteria for declaration or do not fall within the scope of Part IIIA.[1084] The most contentious of the declaration criteria is likely to be that it would be uneconomical to develop another facility to provide the service and/or the facility is of national significance. Conversely, the first element of Section 46 that there is a corporation with a substantial degree of market power is generally unlikely to be controversial in essential facility cases because of the tendency for essential facilities to bear natural monopoly characteristics. As noted by the Hilmer Committee, if a facility is truly essential, its owner will always have a substantial degree of market power within the meaning of

[1079] Competition and Consumer Act 2010, s 44ZZNA.
[1080] Hilmer Report (n 36) 260.
[1081] ibid.
[1082] ibid.
[1083] It was envisaged that the national access regime would apply only where the facility owner and access seeker could not agree on the terms of access, where the facility was of national significance, and where there was no effective regime already in place. 'National Competition Policy: Draft Legislative Package' (Australian Government, September 1994) Explanatory Memoranda, para 1.16.
[1084] Competition and Consumer Act 2010, s 4N(1).

Section 46.[1085] Whilst whether a corporation is found to possess substantial market power will depend upon how the relevant market is defined.

As regards the corporation taking advantage of its market power, the Hilmer Committee considered that there would be little difficulty in establishing that a refusal to deal in an essential facility context involves the facility owner taking advantage of its market power, since "in the absence of such market power access to the facility would be available."[1086] As regards the third element of taking advantage of market power for one or more of the proscribed purposes, the Hilmer Committee acknowledged that denying access to an essential facility could occur for any of the proscribed purposes.[1087] At the same time, it anticipated difficulty for access seekers in demonstrating that facility owners had an anti-competitive purpose when denying access.[1088] It has been suggested elsewhere that the issue of establishing a proscribed purpose is irrelevant since, in any event, the access seeker has not gained access to the facility as a consequence of the refusal.[1089] Pengilley contends that the appropriate basis for evaluation instead involves considering the circumstances in which ownership rights may be circumscribed in the interests of competition policy.[1090] However, the need to undertake this inquiry will cease to exist with the implementation of the new Section 46.

The residual role for Section 46 in relation to Part IIIA also looks set to become more significant with the proposed changes to the declaration criteria in Section 44G(2) of the CCA by the Competition Policy Review Bill. The main

[1085] Hilmer Report (n 36) 243.
[1086] ibid.
[1087] ibid.
[1088] ibid.
[1089] Samantha Hardy, 'Misuse of Market Power – Purpose or Effect?' (1997) 5 *Trade Practices Law Journal* 114, 117.
[1090] Warren Pengilley, 'The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?' (1995) 3 *Competition and Consumer Law Journal* 26, 43.

changes relate to the criteria for promoting competition in a dependent market in Section 44G(2)(a), targeting infrastructure associated with the economic problem in Section 44G(2)(b), and improving the assessment of public interest in Section 44G(2)(d). The existing Section 44G(2)(a) focuses on the right of access, without any need for an assessment of the effect of declaration. The proposed amendment of Section 44G(2)(a) is desirable in that it will require consideration of the effect of declaration rather than access. This will ensure that services will not be declared where there is already effective competition in dependant markets when measured against the likely state of competition in those markets. Where there is already effective competition in dependent markets, the test should not be satisfied because declaration would be unlikely to promote a material increase in competition.[1091]

The proposed amendment of Section 44G(2)(b) would ensure that declarations are limited to services that are provided by infrastructure facilities which can meet total foreseeable demand for the service over the period of declaration at a lower cost than two or more facilities. This may provide welcome certainty in relation to the apparent inconsistency in policy direction that followed the *Pilbara Infrastructure* case.[1092] Much will depend, however, on the approach to determining total foreseeable demand and relative costs, particularly in the context of emerging markets. Section 44G(2)(f) is proposed to become the new Section 44G(2)(d). The existing test that access would not be contrary to the public interest would be replaced to ensure that third party access is only required where it is in the public interest. This amendment is desirable to the extent that it is the only criterion which provides the opportunity to consider the overall consequences of declaration. Reframing it into the positive should ensure that services will be declared only

[1091] Productivity Commission Inquiry Report (n 1064) 172.
[1092] *Pilbara Infrastructure* (n 1069).

where the community as a whole is likely to be better off as a result of declaration.[1093] This should also permit greater consideration of the potential chilling effects of declaration on investment incentives.

7.5.2.3 Telecommunications access regime in Part XIC of the CCA

Part XIC of the CCA sets out an access regime for the declaration of services specific to the telecommunications sector. It was enacted following the deregulation of the Australian telecommunications industry in 1997.[1094] At that time, the ACCC extended the scope of the telecommunications access regime to broadcasting services over cable networks.[1095] The carriage of analogue pay-TV signals and the use of CAS technology were declared on 1 September 1999.[1096] It was considered that, due to substantial barriers to entry and vertical integration, cable operators would have an incentive to deny access to services that compete with their own.[1097] This could have led to a narrower range of programming and higher prices for viewers.[1098]

Once a service is declared,[1099] the relevant service provider must allow third parties access pursuant to the standard access obligations.[1100] This requires an access provider, upon the request of a service provider, to supply an active declared service so that the service provider can provide carriage and/or content services.[1101] The standard access obligations dictate the basic terms of access and provide the basis for access pending commercial

[1093] Productivity Commission Inquiry Report (n 1064) 176.
[1094] Allan Fels, 'Regulating Access to Essential Facilities' (2001) 8(3) *Agenda* 195, 199.
[1095] ibid.
[1096] 'A Report on an Inquiry into the Declaration of an Analogue-Specific Subscription Television Broadcast Carriage Service under Part XIC of the Trade Practices Act 1974' (ACCC, October 1999) <https://www.accc.gov.au/system/files/Declaration%20-%20analogue%20subscription%20TV%20broadcast%20carriage%20service.pdf> accessed 13 August 2017.
[1097] Productivity Commission Inquiry Report (n 736) 374.
[1098] ibid.
[1099] Competition and Consumer Act 2010, s 152AL(3).
[1100] ibid ss 152AR and 152AXB.
[1101] ibid s 152AR(3).

negotiation.[1102] The access regime only applies if and when commercial negotiations fail, with an emphasis on "promoting commercial and self-regulated outcomes."[1103]

The criteria for declaring a service under Part XIC differ from the declaration criteria under the national access regime in Part IIIA. In declaring a service under Part XIC, the ACCC must be satisfied that the declaration will promote the long-term interests of the end-users of carriage services or services supplied using carriage services.[1104] The terms and conditions of access can be agreed between the parties, or take the form of an access undertaking given by the service provider and approved by the ACCC. A special access undertaking can be lodged by a person who is, or expects to be, a carrier or a carriage service provider supplying specified services.[1105] Once accepted by the ACCC, the service becomes a declared service.[1106] In March 2007, the ACCC accepted a special access undertaking from Foxtel relating to its digital set top unit service.[1107]

If the parties are unable to agree the terms of access and there is no access undertaking, the ACCC can make a determination on the terms and conditions of access.[1108] Initially, the ACCC's arbitration determinations concerned only

[1102] Alasdair Grant, *Australian Telecommunications Regulation* (3rd edn, University of New South Wales Press 2004) 95.
[1103] ibid 88.
[1104] Competition and Consumer Act 2010, s 152AL(3)(d). End-users are understood to be the final consumers rather than the access seekers. 'Telecommunications Competition Regulation' (Australian Government Productivity Commission Inquiry Report, 21 December 2001) 257 <https://www.pc.gov.au/inquiries/completed/telecommunications-competition/report/telecommunications2.pdf> accessed 14 August 2017.
[1105] ibid s 152CBA.
[1106] ibid s 152AL(7).
[1107] 'Assessment of Foxtel's Special Access Undertaking in relation to the Digital Set Top Unit Service: Final Decision' (ACCC, March 2007) 12 <https://www.accc.gov.au/system/files/ACCC%20final%20decision-Foxtel%27s%20SAU%20for%20the%20digital%20set%20top%20unit%20service%20%28March%202007%29.pdf> accessed 30 June 2017.
[1108] Competition and Consumer Act 2010, s 44V.

the parties in question, under the so-called "negotiate-arbitrate" model.[1109] However, this model was considered ineffective in constraining Telstra's incentive to offer access to its network on terms less favourable than those enjoyed by its own retail business.[1110] By the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010, the ACCC was empowered to set up front price and non-price terms for declared services, to provide some security for access seekers and certainty for service providers.[1111]

7.5.2.4 Telecommunications-specific anti-competitive conduct regime in the CCA

Part XIB of the CCA sets out a telecommunications-specific anti-competitive conduct regime under which the ACCC can issue a Competition Notice to a carrier (i.e. a telecommunications corporation), if it has reason to believe that the corporation has engaged in anti-competitive conduct. "Anti-competitive conduct" refers to the restrictive trade practices in Part IV of the CCA, which includes Sections 45 and 46. If the conduct persists, the ACCC can seek an injunction and the imposition of a financial penalty by the FCA. Part XIB was intended to supplement Section 46 by increasing the ability of the ACCC to respond quickly to evidence of anti-competitive conduct in telecommunications markets. However, since the introduction of Part XIB in 1997, the ACCC has issued only five Competition Notices and they have all been revoked.[1112]

The most recent Competition Notice was issued in 2006, in relation to a Telstra wholesale line rental price increase.[1113] The increase caused some

[1109] Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010, Explanatory Memorandum.
[1110] ibid.
[1111] ibid.
[1112] See, ACCC Competition Notices Register <http://registers.accc.gov.au/content/index.phtml/itemId/323962> accessed 10 January 2017.
[1113] Part A Competition Notice issued pursuant to Section 151AKA(2) of the Trade Practices Act 1974 to Telstra Corporation Limited, 12 April 2006.

retail prices for the line rental component of Telstra's fixed voice products to fall below the wholesale price. However, Telstra successfully challenged the Notice on procedural grounds.[1114] The FCA held that the ACCC was not entitled to issue the Notice on the grounds that the Notice differed from the prior consultation notice as regards the description of the anti-competitive conduct, and Telstra had been denied procedural fairness and natural justice by not being given the opportunity to respond to the invitation to make a submission to the ACCC on the relevant conduct.[1115] The requirement for the ACCC to issue consultation notices was removed by the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010. However, the ACCC has not issued any further Competition Notices.

It is suggested here that Part XIB is redundant. The repeal of the telecommunications-specific anti-competitive conduct provisions in Part XIB by the recently passed Misuse of Market Power Act is therefore welcomed.[1116] The repeal of these provisions is also arguably necessary to resolve the inconsistency that otherwise arises with the adoption of the new Section 46, given that it dispenses with the "taking advantage" requirement that is presently common to Section 46 and Part XIB. It signals a shift away from the enforcement of sector-specific legislation by the ACCC towards greater reliance on general competition law enforcement. At the same time, competition concerns in the Australian telecommunications sector may be thought to be mitigated by the ongoing structural separation of Telstra's retail business from its network business,[1117] and the migration of Telstra's fixed-line services to the NBN.

[1114] *Telstra Corporation Limited v Australian Competition and Consumer Commission (No.2)* [2007] FCA 493.
[1115] ibid [262-267].
[1116] Competition and Consumer Amendment (Misuse of Market Power) Act 2017, sch 2, para 1.
[1117] Telecommunications (Structural Separation - Networks and Services Exemption) Instrument (No.1) 2011; Telecommunications (Migration Plan Principles) Determination 2011.

NBN Co holds a de facto monopoly over the provision of wholesale telecommunications infrastructure in Australia. This is perhaps unsurprising given the failed attempt to introduce facilities-based competition between Telstra and Optus in fixed-line telecommunications. Experience shows that technical limitations and economic reality in Australia render head-to-head competition involving the duplication of facilities at the network level impracticable. It is arguable, however, that the approach to Telstra's separation into "Telstra wholesale" and "Telstra retail" does not go far enough, when compared to the legal separation of BT and Openreach. Telstra's separation could simply see it migrate its retail services from its fixed-line networks onto the NBN which it may in time acquire.

7.6 Conclusions

The thesis began by acknowledging the widely recognised role of premium sport and movies as key drivers in the development of pay-TV. This chapter has considered the policy implications of this in terms of the scope for mandating supply under general competition law on unilateral refusal to supply and sector-specific access regulation. As regards sector-specific regulation, the proposed repeal in Australia of the telecommunications-specific anti-competitive conduct provisions in Part XIB of the CCA is welcomed, as are the proposed changes to the national access regime in Part IIIA. The proposed changes under the Competition Policy Review Bill to the declaration criteria in Part IIIA would increase the residual role for Section 46. However, it is suggested that questions of consistency arise in relation to policy direction in the light of the *Pilbara Infrastructure* case. This may have implications for the residual role for Section 46 with the adoption of a "purpose and effects" test in the new Section 46.

Whilst these developments would appear to render the question of the relevance of the essential facilities concept especially pertinent in Australia,

it equally arises in the UK given the shift in the competitive access problem away from CAS technology and rise of the premium content bottleneck. It is argued that the case for regulating premium pay-TV content as an essential facility is weak. The general perception that premium sport and movies are key to the development of pay-TV does not necessarily render them indispensable for the purposes of applying the essential facilities doctrine. In fact, the thesis identifies market developments which demonstrate that this is not the case, particularly when the market is assessed from a multi-media, multi-platform perspective. Another key issue in applying the concept of essential facilities in the premium pay-TV context is satisfying the "new product" criterion which relies on the definition of a separate downstream market into which market power is leveraged and abused. The likelihood of establishing this is further limited by the suggestion made in Chapter 4 of the broadening of market definitions in the premium pay-TV context.

CHAPTER 8

CONCLUSION TO THE THESIS

8.1 Restatement of the Research Objective

As technological convergence continues to transform the ways in which premium content is supplied and consumed, the task of ascertaining the implications for the legacy regulatory frameworks of the analogue era becomes increasingly pressing. Difficulty lies in the fact that regulation in the broadcasting sector, including within the context of premium pay-TV, is not purely a matter of competition and economics. There are fundamental socio-cultural considerations, particularly in relation to the coverage of major sporting events, which ultimately concern subjective judgment on the role for the state in ensuring the effective functioning of media markets. Such considerations underpin the complex systems of concurrent regulation under sector-specific legislation and general competition law which have developed in the UK and Australia since the introduction of traditional pay-TV. However, the thesis recommends areas for regulatory reform and identifies issues for further research in the quest to more effectively balance the goals of protecting the public interest and maximising consumer welfare in the supply of premium pay-TV in the digital era.

8.2 Findings and Recommendations

The thesis has identified technological and market developments which challenge the appropriateness of the existing intersection between sector-specific legislation and general competition law as they apply or impact on the supply of premium pay-TV in the UK and Australia. Such developments broadly relate to: (i) the entry of established telecommunications service providers into the sports rights market; (ii) the rise of SVOD (and social media) as audio-visual broadcasting platforms; (iii) the growth of premium drama and

the international television drama market; and (iv) the expansion of the multi-media firm in an increasingly crowded, global communications sector. Central to these developments are the increasing prevalence of the bundling of pay-TV with other communications services, and the increasing scope for multi-homing by viewers and advertisers. The cumulative effect of these developments is to reinforce the network characteristics of the pay-TV industry and the resulting tendency towards the concentration of market power.[1118] It also demonstrates the focus on dynamic competition by traditional pay-TV providers and new entrants alike.

The reinforced tendency towards the concentration of market power must therefore be assessed within the context of strong network effects and dynamic competition. To this end, the thesis recommends further liberalisation of media ownership rules and sector-specific access regulation (which remain relatively more comprehensive in Australia), and the adoption of a technologically-neutral approach towards anti-siphoning regulation in both Australia and the UK. The overall implication is, by default, an increased residual role for general competition law enforcement in both the UK and Australia. However, the refinement of aspects of the existing frameworks in both countries could assist in minimising the likelihood of over-enforcement of the main provisions of UK/EU and Australian competition law, with the attendant risk of unnecessarily dampening the investment incentives on which the future development of pay-TV and the broader communications sector depend.

[1118] The identified tendency towards media market concentration as a consequence of media consolidations looks set to continue as firms seek to capitalise on the opportunities and incentives to expand in the digital era. Eli M Noam, *Media Ownership and Concentration in America* (Oxford University Press 2009) 5.

8.2.1 Merger control following the deregulation of media ownership rules

Tension can arise between regulating media mergers according to the principles of competitive markets and the public interest in media plurality. Media-specific ownership rules are based on the assumption that more concentrated markets pose a greater risk to media plurality. However, it has been identified that the precise impact of market concentration on media plurality or content diversity remains unproven. Much also depends upon how the public interest in media plurality or diversity is defined. The likelihood of such tension arising is not necessarily reduced in the digital era. In fact, proceeding on the basis that there remains some merit (albeit how much remains contentious) in this assumption, it may be higher. This is based on the fact that the tendency towards market consolidation across media distribution platforms is likely to be reinforced by the economies of scope and scale that are presented by technological convergence. This is evident from the increasing number of cross-media mergers in the UK and Australia.

At the same time, however, technological convergence and the rise of the multi-media firm render media ownership rules, in their current form, arguably unworkable and/or redundant. The continued administration of technologically-obsolete media ownership rules that inherently restrict market forces risks engendering inefficiency, contrary to the consumer interest in competition, and producing outcomes that undermine the normative basis for such rules.[1119] Hence the proposed repeal in Australia of the "75 per cent reach" and "2 out of 3" rules under the Broadcasting Reform Bill is supported. The repeal of these rules would represent a degree of convergence with the deregulatory approach adopted in the UK. As already indicated, the repeal of these rules could lead to more concentrated markets in Australia, reinforcing its status as one of the most concentrated media

[1119] This was the view of the Environment and Communications Legislation Committee in the Senate on the Media Reform Bill. 'Report on the Broadcasting Legislation Amendment (Media Reform) Bill 2016' (Senate Standing Committee on Environment and Communication, 7 November 2016) para 2.73.

markets in the Western world.[1120] However, this has to be assessed within the context of Australia's small market and low, geographically-dispersed population, which inherently beg the question of how much market deconcentration is achievable in practice.

It is by no means clear that Australia's approach to media ownership regulation has produced better outcomes, from a media plurality or competition perspective, than would otherwise have prevailed in the absence of such regulation. It has been suggested that the repeal of the "75 per cent reach" and "2 out of 3" rules could also importantly enable metropolitan and regional broadcasters to achieve the necessary scale to compete more effectively against pay-TV providers operating on a global scale. This could increase concerns about the protection/promotion of local content. It is suggested, however, that such concerns could be addressed through the introduction of a modified version of a UK-style media-specific public interest test. In the event of the repeal of the "75 per cent reach" and "2 out of 3" rules, the public interest would arguably lie in the introduction of such a test (so as to facilitate a proper assessment of the proposed takeover of Ten by Lachlan Murdoch and Bruce Gordon, for instance).

The UK framework is not beyond criticism. This has been identified in relation to Ofcom's position on the proposed undertakings in lieu relating to the proposed acquisition by Twenty-First Century Fox of the remaining shareholding in Sky. It has been argued that the proposed acquisition should be referred to the CMA for a Phase 2 investigation on media plurality grounds. More broadly, this case begs the question of whether the UK system is fit for purpose, as regards the considerable discretion that is conferred in assessing the sufficiency of plurality for the purpose of the public interest

[1120] 'Reuters Institute Digital News Report 2017' (Reuters Institute and University of Oxford, 22 June 2017) 116 <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital_News_Report_2017_web_0.pdf> accessed 17 August 2017.

considerations in Section 58(2C) of the EA2002. This thesis contends that these developments together make it all the more imperative that the UK proceeds with the 4-yearly or 5-yearly review of media plurality that Ofcom recommended in 2012.[1121]

8.2.2 Towards technological-neutrality in anti-siphoning regulation

As a general principle, one could argue that the normative basis for retaining the coverage of major sporting events on FTA television remains theoretically sound. In fact, with the rise of pay-TV providers operating on a global scale, aiming content at a transcultural audience, it is arguable that the case for protecting the FTA coverage of sporting events which are considered to foster a sense of national or cultural identity is strengthened (though which events and how many events this requires are subjective and will remain contentious). There is also the fact that traditional pay-TV penetration in Australia in particular, remains relatively low (with around 70 per cent of the population still not able or willing to subscribe to a traditional pay-TV service). This could be mitigated to some extent by the growth of online streaming (with SVOD subscriptions exceeding Foxtel subscriptions for the first time in 2016) at such time as SVOD platforms may enter the sports rights market.[1122]

This thesis takes particular issue with the distinctions that are presently drawn between distribution platforms for the purposes of applying the UK "listing" rules and Australian "anti-siphoning" rules. When the rules were introduced in the analogue era, the structure and revenue models for FTA television and traditional pay-TV were relatively simple and distinguishable. Base assumptions included that most viewers either wanted to watch sporting events in their entirety when broadcast live (or not at all), and there was a

[1121] Ofcom (n 649) para 5.65.

[1122] In 2016, 28 per cent of Australians had SVOD and 27 per cent had linear pay-TV. 'More Australians now have SVOD than Foxtel' (Roy Morgan press release, 8 September 2016) <http://www.roymorgan.com/findings/6957-svod-overtakes-foxtel-pay-tv-in-australia-august-2016-201609081005> accessed 17 August 2017.

clear distinction between live and non-live broadcasting. It has been seen, however, that such assumptions do not necessarily hold true in the digital era. This is particularly the case in relation to the increasing range of ways in which sports coverage is consumed, including live and near-live coverage in highlight format on mobile devices, to either substitute or supplement the consumption of live coverage on traditional broadcast television. It begs the question of how "live" is to be defined in this context. This is not simply a matter of semantics. It will affect the scope and application of anti-siphoning rules which rely on a distinction between live coverage and highlights, as with the dual listing regime in the UK. It will also have wider implications for defining the relevant market and the assessment of market power.

Governments in the UK and Australia have each expressed reluctance to reopen discussion on anti-siphoning regulation.[1123] It is respectfully suggested here, however, that with the digital switchover having been completed over five years ago (in 2012 in the UK and in 2013 in Australia), a comprehensive review of anti-siphoning regulation in both countries would be timely. The question of reviewing the Australian "anti-siphoning" rules did arise in relation to the Media Reform Bill, but it was found to be a separate issue to the matter of media ownership and control.[1124] By contrast, this thesis shows a degree of interdependence between anti-siphoning regulation and media ownership rules as regards their overall impact on the broader communications landscape.

[1123] 'Sporting Future: A New Strategy for an Active Nation' (HM Government, December 2015) 41 (UK) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486622/Sporting_Future_ACCESSIBLE.pdf> accessed 9 August 2017; Jake Mitchell, 'Mitch Fifield hints that some anti-siphoning rules are redundant' *The Australian Business Review* (14 March 2016) (AU) <http://webcache.googleusercontent.com/search?q=cache:jET0Eo63eswJ:www.theaustralian.com.au/business/media/mitch-fifield-hints-that-some-antisiphoning-rules-are-redundant/news-story/7d2db47a0be193586e835868169d5133+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 9 August 2017.

[1124] Senate Standing Committee on Environment and Communication (n 1119).

Proceeding on this basis, the anticipated passing of the Broadcasting Reform Bill arguably reinforces the urgency for a review of the especially comprehensive Australian "anti-siphoning" rules. It is acknowledged that, as part of the 2017 Federal Budget, there is the proposal to remove 100 sporting events from the list.[1125] In principle, this would increase the opportunities for pay-TV providers to bid for sports rights.[1126] Although this must be seen within the context of which events are proposed for removal, namely the less popular events like golf.[1127] Also, the mere removal of events does not address the more fundamental issues regarding the technologically discriminatory nature of the prevailing approach to anti-siphoning regulation.

8.2.3 Implications of the decreasing role for sector-specific access regulation

In a climate of newly emerging technologies and markets, there is much to be said for the emphasis that is placed in Australia on encouraging commercial negotiation of the terms of access to communications infrastructure. In this context, parties acting as rational, profit-maximising firms are likely to be better placed than regulators or courts to determine the most appropriate terms and conditions of access. This was arguably the case with Sky in the UK, where the imposition of the WMO obligation and the basis on which Ofcom decided to remove the WMO obligation in 2015 appear to be at odds with commercial reality. This thesis therefore welcomes the proposed reform of the national access regime in Australia which, together with the implementation of the new Section 46 of the CCA, indicates an increasing residual role for Section 46. However, with the recent passing of the Misuse

[1125] 'Amending the Anti-Siphoning Scheme' (Department of Communications and the Arts fact sheet, May 2017) <https://www.communications.gov.au/sites/g/files/net301/f/factsheet_anti-siphoning_.pdf> accessed 9 August 2017.

[1126] Dr Rhonda Jolly, 'Broadcasting and Content Reform package: broadcasting licence fees' (Parliament of Australia Budget Review 2017-18) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201718/Media> accessed 9 August 2017.

[1127] Department of Communications and the Arts (n 1125) 4.

of Market Power Act, a period of uncertainty will follow regarding how the "purpose and effects" test in the new Section 46 will apply.

According to the revised explanatory memorandum to the Misuse of Market Power Bill, it is intended that the concepts of "substantial lessening of competition" and "purpose, effect or likely effect" in the new Section 46 will be informed by existing jurisprudence relating to other provisions in Part IV of the CCA which incorporate such concepts.[1128] Meanwhile, the Competition Policy Review Bill provides that conduct which would otherwise contravene Section 46 may be authorised by the ACCC where it is unlikely to substantially lessen competition or is likely to result in a net public benefit.[1129] However, enduring uncertainty regarding the assessment of net public benefit, for instance, is likely to be especially problematic in relation to emerging markets, including in the premium pay-TV context. More generally, there is the question of the possible chilling effect on competition of adopting an effects-based approach, which has long provoked debate in the EU.[1130]

With respect to the concept of essential facilities as a subset of refusal to supply, it is proposed that the scope for regulating premium pay-TV as an essential facility is limited (even in the EU where the case law in this area is more developed than in Australia). This is consistent with the other findings in the thesis as to the diminishing ability and incentive for rights owners and pay-TV providers to refuse to supply third parties. Also, the exclusion of rivals may well be indicative of incidental exclusion as a consequence of competition on the merits where competition is *for* the market. Mandating

[1128] Revised Explanatory Memorandum to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2017, paras 1.22 and 4.4.

[1129] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 9.24. The Competition Policy Review Bill passed the House of Representatives on 6 September 2017 and is now before the Senate.

[1130] See, Liza L Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press 2010); Katharine Kemp, '"The Big Chill"? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power' (2017) 40(2) *University of New South Wales Law Journal* (Advance).

supply should not be used to assist new entry in a way that changes the structure of the market as determined by its specific economic characteristics. In the presence of strong network effects and dynamic competition, this may not only be ineffective but potentially counterproductive.

8.3 Areas for Further Research

The findings and recommendations in this thesis are based on observations relating to technological and market developments over the relatively short period of time since the onset of digitalisation and convergence. Underpinning these developments and the ability to draw conclusions from such developments are a number of fundamental issues in need of further consideration from both a theoretical and an empirical perspective. A critical factor is how sustainable the SVOD business model will prove to be. This will have implications, for instance, for the future growth of the international television drama market and the personalisation of television services. A key issue that arises in relation to the growth of the global market for drama is the impact on local content production and regulation. In connection with the increasing personalisation of television services is the question of the extent to which this truly empowers viewers in their capacity as consumers and citizens in a global society. Critical to this is the relationship between technological convergence and cultural convergence,[1131] and the possibility of an existential crisis between the local and the global in the supply of premium pay-TV.

8.3.1 Premiumisation of local content in the global market for drama

The opportunities presented by the growth of the international television market for monetising premium drama are apparent. Less clear is the question of the opportunity that local content presents for traditional pay-TV

[1131] On the various processes of media convergence, see Henry Jenkins, 'Convergence? I Diverge.' *MIT Technology Review* (1 June 2001) <https://www.technologyreview.com/s/401042/convergence-i-diverge/> accessed 10 September 2017.

providers and new entrants to differentiate their services in the increasingly crowded global marketplace. Local content production was reportedly a part of Netflix's international strategy from the outset,[1132] which is significant given the continuing rapid growth of online streaming and its global scale. It is suggested that local content production may become increasingly important as a means of differentiating services in the face of an increasing amount of content from global operators aimed at a transcultural audience.

This is subject to the possibility of viewers detracting from local content to the lower prices of pay-TV providers operating on a global scale.[1133] It also assumes that global operators will not seek to appeal to local interests.[1134] However, the thesis presents evidence to the contrary in both the UK and Australia, as firms begin to "premiumise" local content. This begs the question of the intersection between premium content and local content. In addition to definitional issues, this is significant because it will have implications for the scope of local content quotas, which are the subject of reform proposals in the UK/EU and Australia.

8.3.2 Practicalities of extending local content quotas to online streaming

Recognition of the enduring significance of local content is evident from the recent proposal, as part of the modernisation of the AVMSD, to impose a European content quota of at least 20 per cent on VOD services.[1135] Similarly, the imposition of Australian content quotas on VOD platforms is currently

[1132] Ed Meza, 'Netflix Invests Nearly $2 Billion in European Productions, Promises More' *Variety* (1 March 2017) <http://variety.com/2017/biz/global/reed-hastings-netflix-berlin-100-million-subscribers-1201999745/> accessed 10 August 2017.

[1133] Theodore Levitt, 'The Globalization of Markets' *Harvard Business Review* (May 1983) <https://hbr.org/1983/05/the-globalization-of-markets> accessed 10 September 2017.

[1134] ibid.

[1135] 'Commission updates EU audiovisual rules and presents targeted approach to online platforms' (European Commission press release IP/16/1873, 25 May 2016) <http://europa.eu/rapid/press-release_IP-16-1873_en.htm> accessed 10 August 2017; Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities COM(2016) 287.

being considered as part of the Federal Government of Australia's review of Australian and children's screen content.[1136] At the EU level, VOD services are required to promote European works but no local content quota is imposed on online streaming services in the UK. The proposal to extend local content quotas at the EU level therefore represents another area of potential divergence between the UK and the rest of Europe following Brexit.

As a general principle, it is suggested that imposing a simple local content quota would add little value to the protection/promotion of local content. Such a quota could be met by a SVOD platform simply acquiring the rights to old British/Australian content. This could present particular problems in Australia given the ownership links between the commercial FTA networks, Foxtel, and Stan and Presto. Given Nine's interest in Stan, and the fact that Presto is jointly owned by Seven and Foxtel, a local content quota could lead to such broadcasters simply redistributing the same locally-made FTA programmes online. For the extension of local content quotas to online streaming services to effectively protect/promote the production of local content, there would therefore need to be at least a requirement to fund the production of local content that is original.

8.3.3 Definition of local content in a global communications sector

The definition of "local" will inherently vary between areas and localness of content is ultimately a subjective concept. However, current proposals regarding the extension of local content quotas to online streaming services reinforce the importance of the question of the meaning of local content in a global communications sector. This falls within the broader question of the

[1136] 'Australian and Children's Screen Content Review: Terms of Reference' <https://www.communications.gov.au/australian-childrens-screen-content-review> accessed 10 August 2017. The Review is expected to report to Government by the end of 2017. See, Jason Bosland, 'Regulating for Local Content in the Digital Audiovisual Environment - A View from Australia' (2007) 18(3) *Entertainment Law Review* 103. As already acknowledged, local content is not necessarily the same as Australian content.

impact of technological convergence on cultural convergence in the context of broadcast media content. More specifically, the definition of local content is significant in terms of the implications for the scope of sector-specific rules and the resulting structure of the market. This will in turn have implications for the assessment of market power. Central to the definition of local content will be ascertaining the impact of the globalisation of broadcast media on the economics of local media in the UK and Australia.

Further research in this area should build on Ofcom's consideration in 2009 of local and regional media in the UK.[1137] The focus of this study was on news and it did not consider the issue of localness within the context of premium content. Even within the news context, the subsequent premiumisation of content by suppliers charging for content online makes it more important that the issue of localness of content is also assessed in relation to premium content. Interestingly, in Australia, the meaning of local content does not feature in the Broadcasting Reform Bill. However, this may still represent an opportunity for it to be included within the current reform debate.

8.3.4 Personalisation of television and the realities of viewer empowerment

In an era of content abundance when most viewers can access an increasing amount of content from around the World, the fundamental question arises as to whether the increasing opportunities for viewers to personalise television services provides them with real choice or whether it simply provides the illusion of choice. This question is critical because it goes to the heart of whether viewers are truly being empowered in the digital era to make choices and the extent to which different platforms are substitutable on the demand-side. From a competition perspective, it is relevant to the ability of

[1137] See, 'Local and Regional Media in the UK' (Ofcom, 22 September 2009) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/15957/lrmuk.pdf> accessed 10 September 2017.

viewers to switch suppliers. This will inherently have implications for market definition and the assessment of market power.

The increasing number of services available on the market do not necessarily represent substitutable services for viewers. For example, with the rising number of standalone and bundled services comes an increasing multitude of possible tariffs. The growth in the number of available tariffs is magnified by the prevalence of time-limited promotional discounts for new customers and a host of tariff add-ons. Assuming that services are substitutable implies that all viewers are engaging effectively in the market as consumers to select the services that best suit their requirements. It also disregards the effects of information asymmetry on the ability of consumers to make informed decisions. There would be benefits to be gained from up-to-date research on the impact of online streaming on viewers' consumption preferences and advertisers' decisions regarding budget allocations. This should cover viewer engagement of second screens, and the relative effectiveness of advertising on traditional broadcast media and online.[1138]

8.3.5 Whether new media is substitutable for traditional pay-TV

Despite the increasing popularity of new media in the supply and consumption of premium content, the effect on viewer preferences and the implications for rights owners and advertisers, are not yet well understood. The thesis has indicated areas in which the relevant concept may not be substitutability but rather complementarity. This is significant because, as discussed, the existing regulatory frameworks in the UK and Australia are based on the assessment of substitution possibilities. In terms of market

[1138] This is amidst claims from Google that in 80 per cent of cases adverts on video website are more effective in driving sales. Mark Sweney, 'Google claims YouTube ads are more effective than TV' *The Guardian* (20 April 2016) <https://www.theguardian.com/media/2016/apr/20/google-youtube-ads-tv> accessed 1 August 2017.

definition, it has been suggested that functional market definition is likely to be more important than is otherwise generally deemed to be the case.

As discussed, functional considerations generally form part of the analysis of the relevant product and geographic dimensions of a market, through the application of the SSNIP test.[1139] This is particularly the case in the UK where functional considerations are typically subsumed within the product market definition. However, it is also relevant in Australia where, despite the ACCC treating the definition of the functional dimension of the relevant market as a distinct exercise,[1140] the functional (and temporal) dimensions are identified as relatively neglected aspects of market definition.[1141] It has also been noted that the different functional levels are often complements rather than substitutes.

Further research on the relationship between new media and traditional pay-TV should importantly be carried out from the advertiser-side, as well as the viewer-side. Whether new media is substitutable for traditional pay-TV is also relevant to the assessment of the sufficiency of plurality. Lack of clarity as to the meaning of the sufficiency of plurality therefore reinforces uncertainty regarding the meaning of the public interest in media plurality in the digital era.

8.4 Concluding Remarks

In the converged digital environment, it is important to adopt a multi-media, multi-platform approach towards the economic regulation of premium pay-TV. The public interest and consumer welfare need to be assessed within the broader context of the competitive environment in the global communications sector. It is arguable that such interests are converging, and

[1139] ibid.
[1140] ACCC Media Merger Guidelines (n 91) 23-25.
[1141] Caron Beaton-Wells, *Proof of Antitrust Markets in Australia* (Federation Press 2003) 26.

this should be reflected at the intersection between sector-specific regulation and general competition law. That said, the UK and Australian markets remain unique and specific changes to the regulatory frameworks in the respective jurisdictions must reflect this. Overall, the findings and recommendations in this thesis produce a model of regulation which more effectively balances the interests of UK and Australian viewers as citizens of a global society and consumers in international communications markets. In addition to promoting the future development of pay-TV, this may ensure the competitiveness of UK and Australian broadcasters on the world stage.

APPENDIX 1 - New Section 46 of the Competition and Consumer Act 2010

(Referred to on page 30)

1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:

(a) that market; or

(b) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) supplies goods or services, or is likely to supply goods or services; or

(ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or

(c) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) acquires goods or services, or is likely to acquire goods or services; or

(ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

(3) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:

(a) a body corporate that is related to that corporation has, or 2 or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or

(b) that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in that market.

(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:

(a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

(i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and

(b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:

(i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or

(ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.

(5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control that market; or

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

(8) In this section:

(a) a reference to power is a reference to market power; and

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

APPENDIX 2 - Key indicators for the UK and Australia

(Referred to on page 40)

	UK	Australia
Total population (millions)[1142]	65.64	24.13
Population growth (annual per cent)[1143]	0.8	1.4
Surface area (sq km thousands)[1144]	243.6	7,741.2
Population density (ppl per sq km)[1145]	271.3	3.1
GDP (US$ millions)[1146]	2,618,886	1,204,616
GDP (US$ per capita)[1147]	42 651	47 770
GDP World ranking[1148]	5	14
GDP growth (annual per cent)[1149]	1.8	2.8

[1142] These figures are taken from the country profiles for the UK and Australia in the World Bank's DataBank <http://databank.worldbank.org/data/home.aspx> accessed 21 July 2017.
[1143] ibid.
[1144] ibid.
[1145] ibid.
[1146] These figures are taken from the World Bank's GDP world ranking <http://databank.worldbank.org/data/download/GDP.pdf> accessed 25 July 2017.
[1147] These figures are taken from the OECD's country profiles for the UK and Australia <https://data.oecd.org> accessed 25 July 2017.
[1148] World Bank (n 1142).
[1149] World Bank (n 1146).

APPENDIX 3 - UK Listed Events

(*Referred to on page 195*)

Group A	The Olympic Games
	The FIFA World Cup Finals Tournament
	The FA Cup Final
	The Scottish FA Cup Final (in Scotland)
	The Grand National
	The Derby
	The Wimbledon Tennis Finals
	The European Football Championship Finals Tournament
	The Rugby League Challenge Cup Final
	The Rugby World Cup Final
Group B	Cricket Test Matches played in England
	Non-Finals play in the Wimbledon Tournament
	All Other Matches in the Rugby World Cup Finals Tournament
	Six Nations Rugby Tournament Matches involving Home Countries
	The Commonwealth Games
	The World Athletics Championship
	Cricket World Cup – the Final, Semi-Finals and Matches involving Home Nations' Teams
	The Ryder Cup
	The Open Golf Championship

APPENDIX 4 - Australian Anti-Siphoning List

(*Referred to on page 200*)

Olympic Games

1.1 Each event held as part of the Summer Olympic Games, including the Opening Ceremony and the Closing Ceremony, except for:
(a) any event held between 6 August 2016 and 22 August 2016 (Australian time) as part of the 2016 Summer Olympic Games, including the Opening Ceremony and the Closing Ceremony.

1.2 Each event held as part of the Winter Olympic Games, including the Opening Ceremony and the Closing Ceremony.

Commonwealth Games

2.1 Each event held as part of the Commonwealth Games, including the Opening Ceremony and the Closing ceremony.

Horse Racing

3.1 Each running of the Melbourne Cup organised by the Victoria Racing Club.

Australian Rules Football

4.1 Each match in the Australian Football League Premiership competition, including the Finals Series, except for:
(a) all matches to be played as part of the 2017 Australian Football League Premiership competition, including the Finals Series but excluding the Grand Final.

Rugby League Football

5.1 Each match in the National Rugby League Premiership competition, including the Finals Series, except for:
(a) all matches to be played as part of the 2017 National Rugby League Premiership competition, including the Finals Series but excluding the Grand Final.

5.2 Each match in the National Rugby League State of Origin Series, except for:
(a) any of those matches to be played between 31 May 2017 and 12 July 2017.

5.3 Each international rugby league "test" match involving the senior Australian representative team, played in Australia, New Zealand or the United Kingdom, except for:
(a) the match to be played on 5 May 2017.

5.4 Each match of the Rugby League World Cup involving the senior Australian representative team.

Rugby Union Football

6.1 Each international "test" match involving the senior Australian representative team selected by the Australian Rugby Union, played in Australia, New Zealand, South Africa or Europe, except for:
(a) the match to be played in Australia on 16 September 2017 between the senior Australian representative team selected by the Australian Rugby Union and the senior Argentine representative team.

6.2 Each match in the quarter-finals, semi-finals and the final of the Rugby World Cup tournament, except for:
(a) any match to be played as part of the 2015 Rugby World Cup tournament that is a quarter-final, semi-final or final.

6.3 Each match of the Rugby World Cup tournament involving the senior Australian representative team selected by the Australian Rugby Union, except for:
(a) any match to be played as part of the 2015 Rugby World Cup tournament involving the senior Australian representative team selected by the Australian Rugby Union.

Cricket

7.1 Each "test" match involving the senior Australian representative team selected by Cricket Australia played in Australia, except for:
(a) each "test" match played between 3 November 2016 and 7 January 2017.

7.2 Each "test" match between the senior Australian representative team selected by Cricket Australia and the senior English representative team, played in Australia or the United Kingdom.

7.3 Each one-day cricket match involving the senior Australian representative team selected by Cricket Australia played in Australia, except for:
(a) each one day cricket match played between 4 December 2016 and 26 January 2017.

7.4 Each Twenty20 cricket match involving the senior Australian representative team selected by Cricket Australia played in Australia, except for:
(a) each Twenty20 cricket match involving the men's senior Australian representative team played between 26 January 2016 and 31 January 2016; and
(b) each Twenty20 cricket match involving the women's senior Australian representative team played between 26 January 2016 and 31 January 2016.

7.5 Each match in the semi-finals and the final of the International Cricket Council One Day International World Cup.

7.6 Each match of the International Cricket Council One Day International World Cup involving the senior Australian representative team selected by Cricket Australia.

7.7 The final of the International Cricket Council Twenty20 World Cup, except for:
(a) the final of the 2016 International Cricket Council Twenty20 World Cup.

7.8 Each match of the International Cricket Council Twenty20 World Cup involving the senior Australian representative team selected by Cricket Australia, except for:
(a) any of those matches to be played as part of the 2016 International Cricket Council Twenty20 World Cup.

Soccer

8.1 The English Football Association Cup final.

8.2 Each match of the Fédération Internationale de Football Association World Cup tournament.

8.3 Each match in the Fédération Internationale de Football Association World Cup Qualification tournament involving the senior Australian representative team selected by the Football Federation Australia, except for:
(a) the matches to be played between 6 October 2016 and 5 September 2017.

Tennis

9.1 Each match in the Australian Open tennis tournament, except for:
(a) any match held as part of the 2016, 2017, 2018 and 2019 Australian Open tennis tournaments that is not a men's or women's singles final.

9.2 Each match in the men's and women's singles quarter-finals, semi-finals and finals of the Wimbledon (the Lawn Tennis Championships) tournament, except for:

(a) any of those matches held as part of the 2017 Wimbledon tennis tournament.

9.3 Each match in the men's and women's singles quarter-finals, semi-finals and finals of the United States Open tennis tournament, except for:

(a) any matches held as part of the 2016 United States Open tennis tournament.

9.4 Each match in each tie of the International Tennis Federation Davis Cup World Group tennis tournament involving an Australian representative team, except for:

(a) any match in any tie of the 2017 International Tennis Federation Davis World Cup Group tennis tournament involving an Australian representative team.

Netball

10.1 Each international netball match involving the senior Australian representative team selected by the All Australian Netball Association, played in Australia or New Zealand, except for:

(a) the matches to be played on 30 August 2017, 3 September 2017, 5 October 2017 and 11 October 2017 involving the senior Australian representative team.

10.2 The semi-final of the Netball World Championships if it involves the senior Australian representative team selected by the All Australian Netball Association.

10.3 The final of the Netball World Championships if it involves the senior Australian representative team selected by the All Australian Netball Association.

Golf

11.1 Each round of the Australian Masters tournament, played as part of the Professional Golfers Association Tour of Australasia, except for:

(a) each round of the 2015 Australian Masters tournament, played as part of the Professional Golfers Association Tour of Australasia.

11.2 Each round of the Australian Open tournament, played as part of the Professional Golfers Association Tour of Australasia, except for:

(a) each round of the 2017 Australian Open tournament, played as part of the Professional Golfers Association Tour of Australasia.

11.3 Each round of the United States Masters tournament, played as part of the Professional Golfers Association Tour, except for:

(a) each round of the 2017 United States Masters tournament, played as part of the Professional Golfers' Association Tour.

Motor Sports

12.1 Each race in the Fédération Internationale de l'Automobile Formula 1 World Championship (Grand Prix) held in Australia.

12.2 Each race in the Fédération Internationale de Motocyclisme Moto GP held in Australia, except for:

(a) each race in the Federation Internationale de Motocyclisme Moto GP held in Australia in 2016.

12.3 Each race in the V8 Supercar Championship Series, including the Bathurst 1000.

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